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Volume 37 No. 4 2004

## TRIBUTE

Tribute to Paul Galanti

*Gerald L. Bepko*

## 2003 SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

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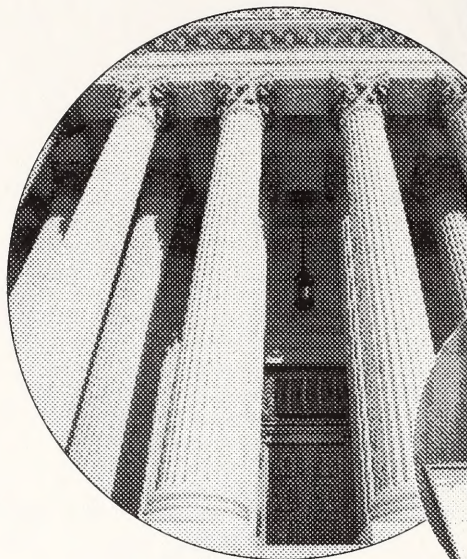
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(ISSN 0090-4198)

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Volume 37

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Number 4

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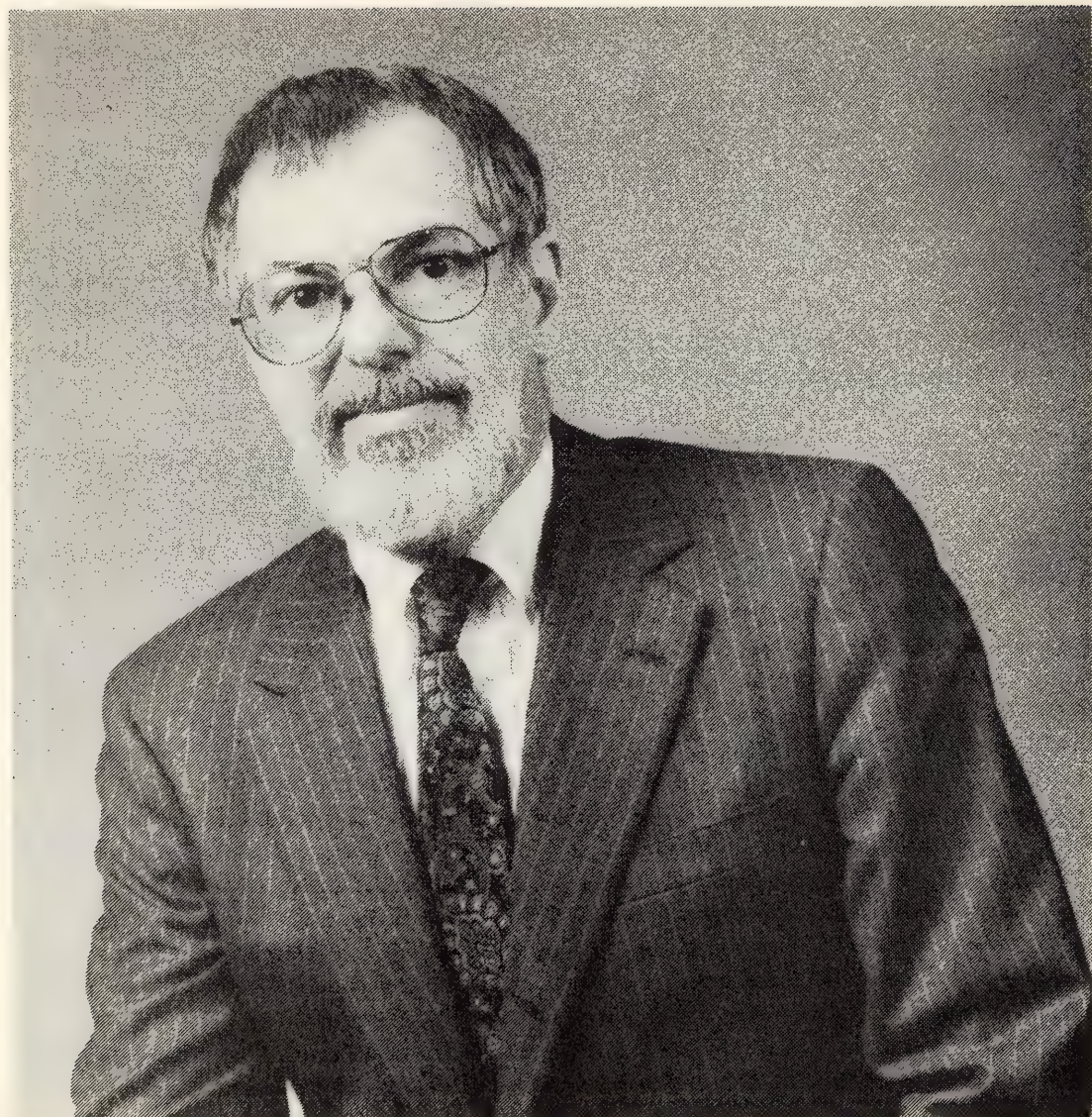


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**PAUL GALANTI**



## TRIBUTE TO PAUL GALANTI

GERALD L. BEPKO\*

In the fall term of 1972, the Indiana University School of Law family was still celebrating the 1970 opening of the new facility at 735 West New York Street. In that new facility the offices for faculty were distributed throughout the building in newly arranged suites of three. Each suite contained two faculty offices and one office in the middle for an assistant. As a new member of the faculty in 1972, I had the good fortune to be assigned to the suite of offices that already included our dear friend Paul Galanti.

Paul and I became friends quickly in those beautiful late summer days on the second floor south hall of the new building. Paul and I talked about our common experiences living in Chicago. I grew up there; Paul grew up in New Jersey but went to Law School at the University of Chicago. We shared an affinity for the ever hapless Chicago Cubs, near north side Rush Street social life, Windy City politics still then dominated by the first Mayor Daly, and *Chicago Daily News* columnist Mike Royko whose columns were carefully clipped and packaged each month and sent to us by my mother who still lived in Chicago. All this laid the foundation for a bond of friendship that has grown stronger and stronger as the next thirty-one years flew by.

I remember thinking that Paul had a near perfect preparation for a career in law. His father was a judge in New Jersey, and Paul attended the best schools—Choate, Bowdoin, and the University of Chicago Law School. Paul was not, however, influenced much by the Milton Friedman Chicago school of free market economics that later may have contributed to the rise of such luminary Chicago law faculty as Richard Epstein, Judge Frank Easterbrook, and Judge Richard Posner. In contrast, Paul left the University of Chicago as a Kennedy/Johnson liberal who found the Johnson administration to be less idealistic than suited his New England Democratic Party populism. As this tribute to Paul is written, former Vermont Governor Howard Dean is making a strong bid for the Democratic Party nomination for President. In his campaign Governor Dean has sounded a lot like Paul Galanti.

After leaving the University of Chicago, Paul joined an excellent Chicago law firm (Ross Hardies) and began a corporate practice representing large corporate clients such as People's Gas Company. Paul probably was never comfortable in this type of silk-stocking, aristocratic law practice working to facilitate corporate reorganizations and protecting wealth from taxation. This was to the good fortune of Indiana University because it led to Paul's acceptance of an appointment here in 1970, the year the law building on New York Street opened.

Teaching business association courses made sense for Paul because of his experience at Ross Hardies and his instinct for questioning the justice and societal utility of some of the norms of this field of law. His tendency to take the position

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of the "little guy" in the analysis of corporate law matters gave students something special. Over the years Paul's students have understood law better because Paul provoked them with examples of the drama that unfolds when the interests of large organizations clash with those of ordinary people or when the interests of large organizations clash and cause collateral damage to ordinary people. His students became more adaptable and developed a more profound capacity for analysis because they were forced to think about underlying economic and social considerations. Also, after hearing Paul's repeated examination of the public interest, his students seemed more likely to become thoughtful and socially responsible members of the profession.

Paul's contributions to student development were not confined to the classroom. In his first years on the faculty Paul pitched in and took on extra assignments such as faculty advisor to the *Indiana Law Review*. This was a very important role, since the *Review* had only begun publication a few years earlier. It was Paul's role not only to help establish a culture of excellence, but also to make certain that the culture and traditions were those of the students to be handed from one class of law review editors to the next. This is something Paul did with real dedication for eighteen years. To some considerable degree the excellence of the *Indiana Law Review* in which this tribute is published is based on Paul's devotion to the ideals of a student managed educational process and his steadfastness as faculty advisor to the *Review*.

In 1976 while we still shared the office suite, Paul underwent a round of serious surgery. Through his surgery and its aftermath, I came to understand Paul's tremendous courage. This also was a time when we got to know Paul's family better. We already knew Jean and sons Ben and Daniel, who were about the age of our children, but, through this difficult time, we met his father, Judge Benjamin Galanti, his sister, Benita and his mother, Rosalye. The intertwining of our families has brought us together in various ways on many occasions up to the present. Our spouses, both named Jean, have remained friends. A few years after Paul's surgery, while we were on sabbatical leave at Oxford, Jean, our children and I had dinner with Paul's sister Benita, her husband Ian and their son Adrian at their home in London. I remember with sadness when Judge Galanti died and I remember the feelings that Paul worked through in the wake of his death. Many years later, in the 1990s, Paul's mother moved from New Jersey into Hoosier Village, the same retirement home in Indianapolis to which my mother and stepfather had earlier moved from their home in Chicago. In the last days before Mrs. Galanti died at age 96, she and my mother sat at the same table for meals.

The inevitable moments of sadness in life never interrupted for very long Paul's sense of humor—often self effacing—which has been a treasure of the law school. A favorite story about Paul involves his often taking extra time to post his grades. This was in the days when we did not have grade deadlines and Paul, like many of us, still reflected the traditions of law schools where grades were posted months after exams were administered. We were both in our offices in the second floor south suite with all the doors open. Paul's booming voice could be heard up and down the hall. As the weeks went by after exams, anyone nearby could hear Paul receive and respond to phone calls about grades. Some of these



calls were reminiscent of the classic Bob Newhart one-sided telephone humor of the early sixties. I would hear Paul answer the phone. He would say, "HELLO" with a touch of annoyance in his voice. It was as if he knew who was calling. He was right. The conversation would continue, "No, they're not." (pause) "No!" (pause) "Yes, I know that." (pause) "EVENTUALLY!" (click)

A prominent vehicle for Paul's playful wit is the letters he writes to various editors, including letters to the editors of *Motor Trend* and *Auto Week* reflecting his lifelong interest in automobiles. His interest in cars and politics came together when, in 1994, he wrote a letter to the *Wall Street Journal* titled "I have Indiana's most infuriating car." In the letter, he responds to a woman who complained about the way she is treated by drivers of cars who disagree with her conservative politics, apparently displayed on her car. Paul wrote: "She should come to Indiana. I have on my car two Clinton-Gore bumper stickers, an Earth Day sticker, and a sticker supporting the President's Health Care Proposal. On the front I have a license plate that reads DEMOCRAT, and my official license plate in the rear is DEMCRAT, since Indiana only allows seven letters on vanity plates." Then, Paul continued: "Have I ever gotten an obscene gesture from drivers of cars with Republican/Conservative bumper stickers? She better believe it . . . . Do I make comparable gestures to conservatives while driving?" "Well, for one thing," Paul lamented, "In Indiana that would mean driving with one hand all the time . . . . Actually, I'm just satisfied watching conservatives become apoplectic when they see my car."

Paul's light-hearted moments and sense of humor were in vivid contrast to the serious side that he exhibited when there were substantive law school matters at stake. As relatively young faculty members, Paul and I were drawn into debates on a number of issues within the law school—issues that reflected sharp differences of opinion. Paul was always ready to hear the views of others, but when it came time to make a decision he was never afraid to express himself in the most direct way. On more than one occasion he exemplified the adage that there is a need to speak truth to authority, and the school's affairs were managed in a much more principled and effective fashion because of Paul's forthrightness and independence. I'm pleased to add that Paul and I usually found ourselves on the same side in these discussions, especially in the most important cases where fundamental directions and choices for the school were in play.

Another interest we shared was running, although Paul didn't become a runner until he was about forty years old. I remember Paul's first efforts to run around Military Park and thinking it would take him a long time to keep up with those of us who were already runners. I also remember, only a year later, having great difficulty keeping up with Paul, and with Tom Reed, and how many times I was impressed with the excellent times Paul recorded in various races such as the Indianapolis Mini-Marathon.

While our friendship continued throughout the ensuing years, it was at more of a distance beginning in 1981 when I became dean. Of course Paul regarded me differently when I joined the administration, making sure that I understood that our friendship would not guarantee Paul's support for anything but the best ideas for the school as he defined them. What Paul did not supply in unquestioning support, however, he did supply in productivity, and I was proud



of Paul's academic work, which was maturing at about that time. His writing on the law of corporations culminated in the publication in 1991 of the four volumes on Business Associations in Indiana that are a part of the West Publishing Indiana Practice Series. While this Series is intended to serve Indiana lawyers and judges, many subjects, including Paul's treatment of business associations, are covered with a much broader scope and contain very high quality breadth and analysis. In 1982 Paul was appointed as a visiting professor at the University of Illinois College of Law—a role in which I had served five years earlier in 1977 and something I was pleased to recommend for Paul. And I was pleased to see Paul take an interest in the School's China Summer Program, which he headed up on four different occasions. Coupled with the spring term Paul spent in China as a visiting scholar in 1993, this work in China has made Paul into a law faculty member with a significant international and comparative law dimension.

In 1998, in a not untypical turn of the seasons of faculty life, Paul's interests moved to the continuing development of the culture of our university and its faculty. In pursuit of this interest, Paul was elected Vice President of the IUPUI Faculty, which at the time was some 1700 strong. The majority of those faculty are from the School of Medicine, which makes Paul's election, as a professor of law (the first member of the law faculty elected to this office), even more notable. Since I was Chancellor at the time, Paul and I came back to work closely together again, twenty-six years after sharing the office suite on the second floor south. Two years later, in 2000, as most of us expected, Paul proceeded through the chairs and was elected President of the IUPUI faculty, once again expanding the time and projects on which we were able to collaborate. Over the ensuing two years of Paul's presidency I thought many times about the cycles of life. Twenty-eight years earlier, as young faculty, we had spent a lot of time together seeking change, sometimes restlessly, and sometimes in a manner that was unsettling to older faculty, most of whom had already more than once been through what we thought was novel. Now Paul and I were together as leaders of the campus, trying to advance this wonderful university in a circumspect manner, probably to the frustration of some young faculty seeking change.

These four years were poignant for me, as I suspect they were for Paul. He and I were bringing our service to the larger university to a close on nearly the same schedule. He concluded his term as Faculty Council President and retired at the end of the 2001-02 academic years. I retired from the administration at the end of the 2002-03 academic year.

During these four years of renewed collegiality and friendship, I had the pleasure of seeing Paul employ the same courage, the same independence, the same willingness to stand up for what is right, the same friendly collegial approach and the same sense of humor that I admired thirty years earlier. His steady contributions as a teacher, his scholarship and his leadership have been very important to our School of Law, to all of IU, and particularly to this special campus in Indianapolis known as IUPUI.

In the year 2000, the campus administration concluded that a part of the annual Chancellor's Honors Convocation should be devoted to a celebration of the history and remarkable values that have been the foundation for campus growth. We thought we should tap into institutional memory by having long-



serving retiring faculty members speak and reflect on the development of the campus. Each speaker is to be a person who is familiar with our origins, our traditions, our hopes and aspirations, and a person who has been a significant factor in building the network of collegiality, trust and friendship that has been such a significant factor in IUPUI's growth. In that first year (2000) the first speaker was Bob Holden, who was at that time retiring as Dean of the IU School of Medicine. In 2001 Paul Nagy spoke as a former Associate Dean of Faculties and the retiring chair of the Philosophy Department here at IUPUI. In 2002, the year in which he made his transition to retirement, the speaker was Paul J. Galanti. I had the pleasure of participating in his selection for this role, extending the invitation to him, and introducing him to the assembled faculty, students, staff and alumni. It was an honor for me as the campus Chancellor be able to make that introduction of Paul highlighting the importance of our friendship, long association, and his many contributions to our academic success, and it has been an honor for me to write this tribute to him. He is one of those stalwart colleagues who helped build and sustain a great university, and I know I speak for many when I say that I am pleased and proud to be his friend and colleague.







# PLU ÇA CHANGE: INDIANA JUDGES AND SALARIES

RANDALL T. SHEPARD\*

Despite the recent crisis in the state budget, we have been able to persuade the Indiana General Assembly to appropriate new money for a host of important improvements to the court system. The legislature has agreed to help us build a twenty-first century case management system for the trial courts, expand our family courts initiative, finance interpreter services for litigants who do not speak English, improve public defender representation, and support development of drug courts. All of this has represented a strong statement about the General Assembly's commitment to improving the system of justice.

Happy as these demonstrations of commitment have been, especially in light of how little money Indiana has for new projects, the state's judiciary has been down-hearted about our inability to obtain any adjustment in the compensation of judges. The last general pay increase passed the legislature in 1995, for implementation in 1995 and 1997.<sup>1</sup> The General Assembly passed a subsequent increase in 2001, but Governor Frank O'Bannon vetoed it.<sup>2</sup> There was a ray of hope in the 2004 session of the legislature, which gave judges and prosecutors an adjustment to account for skyrocketing health insurance premiums and also created an advisory commission to recommend salary changes for all public officers.<sup>3</sup> Still, the net result has been a stretch of eight years during which judicial salaries have stood still, being eaten away in real terms by the effects of inflation.

While such stretches have occurred during my time on the bench, I recently discovered that the problem of lagging judicial salaries has a more ancient heritage than any of us might have imagined.

Perhaps the most depressing text I have encountered in the last year was an account of a debate about salaries for judges and other state officers during the legislative session of 1842-43.

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1. 1995 Ind. Acts 280. Section 7.1 of the Act established a state-wide base salary of \$90,000 for full-time circuit, superior, municipal, county, and probate judges. Section 7 increased the salaries of Court of Appeals judges from \$76,500 to \$110,000 and increased the salaries of Supreme Court justices from \$81,000 to \$115,000.

2. Governor's Veto Message for House Enrolled Act 1856, STATE OF INDIANA JOURNAL OF THE HOUSE OF REPRESENTATIVES, 112th General Assembly, 1st Reg. Sess., at 1328 (2001); STATE OF INDIANA JOURNAL OF THE SENATE, 112th General Assembly, 1st Reg. Sess., at 1176 (2001).

3. 2004 Ind. Acts 95. The Public Officers Compensation Advisory Commission is comprised of two members appointed by the Speaker of the House of Representatives, two members appointed by the president pro tempore of the Senate, two members appointed by the Governor, two members appointed by the Chief Justice of the Indiana Supreme Court, and one member appointed by the Chief Judge of the Indiana Court of Appeals. The Commission is charged with reviewing the current salaries of public officers and considering recommendations and information regarding suitable salaries. On a biennial basis, the commission must recommend to the Legislative Counsel and Budget Committee suitable salaries for those public officers identified by the act.



It seems that Democratic Senator Nathaniel West of Indianapolis proposed *lowering* the salaries of the governor, other executive branch officials, and legislators. The senate finance committee, dominated by Whigs, opposed these reductions. "Illiberal and incompetent allowances will not secure the services of competent and vigilant officers," the committee said, but ample compensation will "enable the poor man as well as the rich" to hold offices rather than to secure "to the wealthy a monopoly of all offices."<sup>4</sup>

The committee was especially emphatic about the need to increase judicial salaries. The committee declared that as the culture and economy of the state advanced, "judicial questions multiply, not only in number, but in contemplation and interest; and the benign influence of the judiciary is the more felt and the more needed."<sup>5</sup> It was an eloquent plea issued in a bleak environment. Indiana's trial judges were the twenty-fifth highest paid in the nation, but of course there were only twenty-six states at the time. Pay for members of the Indiana Supreme Court was twenty-five percent below the average of other states.<sup>6</sup> The committee's plea did not produce any pay raises for judges.

The senate committee's call of alarm was hardly the first official declaration that low salaries were bad policy. When Stephen C. Stevens resigned from the Indiana Supreme Court in March 1836 before his term was complete, Governor James Noble had considerable trouble recruiting a replacement. He acknowledged publicly that low salary made the chore difficult and said that unless there was an increase in compensation, "those of the highest attainments will be driven from the Bench, and seats there will only be accepted by those who have not talents to live by the practice."<sup>7</sup>

Other nineteenth century governors observed that low salaries had an adverse effect on Indiana's courts. As Governor George Wright gave his last message to the general assembly in 1857, he noted that the salary of the Supreme Court was so low that its members could only afford to be at work in Indianapolis the minimum of sixty days required by law and that this had produced a substantial backlog of undecided cases.<sup>8</sup> His successor Ashbel P. Willard made a similar

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4. DONALD F. CARMONY, *INDIANA, 1816-1850: THE PIONEER ERA* 247-48 (1998).

5. *Id.* at 248.

6. *Id.*

7. *Id.* at 276.

8. In his address to the General Assembly, Governor Wright stated:

The salaries paid to the Judges of our Courts are not sufficient to answer the demands of justice and sound policy. If we desire to have the full service of our Judges, and expect them to secure the confidence of the people, by a laborious and faithful discharge of their duties, it is absolutely necessary to increase their compensation. This is emphatically true in relation to the Judges of our Supreme and Circuit Courts. The compensation for the services of the Judiciary, above all other departments, should be such that the State could command, at all times, the services of our most worthy and competent men.

The increase of business in our Supreme Court, and the frequent equal division of the



observation in his annual address two years later.<sup>9</sup>

And the 1836 resignation was but the first in a string of resignations due to money. Samuel B. Gookins, one of the better known among my court's nineteenth century justices, resigned in December 1857 over money.<sup>10</sup> He had barely departed when William Z. Stuart left the Supreme Court in January 1858, over money.<sup>11</sup>

Of course, departures over money were hardly just a nineteenth century phenomenon (or just an appellate court phenomenon). Low salaries played a prominent role in a series of episodes some fifty years ago that probably represent the lowest point in the modern history of the Indiana Supreme Court: Governor George Craig's treatment of the Court to a parade of justices-du-jour. When Justice Floyd Draper resigned in January 1955, he set off a flurry of "temporary appointees." Governor Craig named four people to the court between January and May.<sup>12</sup> One of these, former house majority leader George W. Henley of Bloomington had the bad manners to tell the press that the "last thing

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Judges, upon important questions, presents to you the propriety of providing, by law, for an additional Judge.

JOURNAL OF THE INDIANA STATE SENATE, 39th Sess., at 69 (1857).

9. Governor Willard subsequently stated, Section 12 of Article 1 of our Constitution declares that "justice shall be administered freely and without purchase, completely and without denial, speedily and without delay." Upon examination I find there are more than nine hundred undecided cases in the Supreme Court.

The law requires the Judges of the Supreme Court to be present at the Capitol but sixty days in each year. That is as much time as they can spend here upon their present salary. If they receive a compensation sufficient to enable them to devote more of their time at the Capitol to the consideration of the judgments they are required to revise, the number of undecided causes would be much diminished....

While I have thus urged the necessity of the increase of the salaries of the Judges of the Supreme Court, I do not regard it as less your duty to provide for the Judges of the Circuit courts. Many able and accomplished lawyers have accepted positions as Circuit Judges, entertaining the hope that the Legislature would be willing to pay them a reasonable compensation for their services. It would be difficult to select many among them who would not receive in the practice of their profession more than twice that which they receive for their official services. The State has no right to require of one of her citizens that he should toil to see that crime is punished and justice administered, without giving that citizen a reasonable compensation.

JOURNAL OF THE INDIANA STATE SENATE, 40th Sess., at 17-18 (1859).

10. Minde C. Browning et al., *Biographical Sketches of the Indiana Supreme Court Justices*, 30 IND. L. REV. 328, 350 (1997).

11. JEROME L. WITHERED, *HOOSIER JUSTICE: A HISTORY OF THE SUPREME COURT OF INDIANA* 121 (1998).

12. *Id.* at 93.



in my life I would do" was to stay on the Supreme Court, but that serving for a few months "would allow my grandchildren to say that grand-daddy served on the Supreme Court."<sup>13</sup> Governor Craig defended his series of revolving door appointments by pointing out that the low salary level made it difficult to convince attorneys to give up their law practice for service on the bench.<sup>14</sup>

Later in the twentieth century, pay for Indiana trial judges once again sat at the spot identified by the senate finance committee in 1842. When the Indiana Judges Association went to the legislature in 1978, asking for a pay raise after three years without so much as a cost-of-living adjustment, there was only one state that paid its trial judges less than Indiana.<sup>15</sup> They were back the following year, per custom, by which point Indiana had slid to fiftieth.<sup>16</sup> Fiftieth proved not to be the bottom, for by 1989, Indiana trial judges had fallen below most of the American-flag territories and ranked fifty-fourth.<sup>17</sup>

Distressing as all this history is, the most interesting question is, "Why?" What is it about Indiana that has so long led it to restrain the salaries of its officeholders. Demographically speaking, Indiana is a rather typical state. Why does it take an approach to public salaries that is so much more conservative than scores of other states with similar size and wealth?

Professor James H. Madison of Indiana University, the leading Indiana history scholar of our day, has postulated that the state's conservative approach represents afterglow from the spectacular failure of the biggest venture ever launched by Indiana government: the internal improvements plan launched in 1836, most famously the Wabash-Erie Canal. Madison has argued that the magnitude of the ensuing fiscal calamity, leading as it did to a constitutional convention and constitutional provisions to prohibit state debt and state investment in private ventures, has influenced Indiana ever since. "[I]n a curious irony of history this venturesome pioneer generation contributed to the reluctance of succeeding generations to take similar risks, to use state government, as they had, to pursue the general welfare."<sup>18</sup> Describing the long-term impact more particularly, Madison has said:

[T]his revulsion contributed generally to shaping a more conservative outlook in Indiana, a reluctance to venture actively into the public arena, a tendency of Hoosiers to prefer limited state government. Whether this is the proper lesson to be learned from the system of 1836 is open to debate, but it is the lesson generation so Indianans have chosen to

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13. *Id.* at 94.

14. Browning et al., *supra* note 10, at 353.

15. Jack Averitt, *Judges Pay Bills Other Goodies*, INDIANAPOLIS NEWS, Dec. 15, 1978, at C15.

16. *House Oks Judges Salary Increases*, INDIANAPOLIS NEWS, Mar. 9, 1979, at C8.

17. CHIEF JUSTICE RANDALL T. SHEPARD, *JUSTICE SHALL BE ADMINISTERED FREELY: STATE OF THE INDIANA JUDICIARY 1988-2004*, at 39-40 (2004).

18. JAMES H. MADISON, *THE INDIANA WAY* 85 (1986).



learn.<sup>19</sup>

In such a vision of government, one need not be so concerned if low salaries tend to dampen interest in serving in positions of leadership.

Indiana's recent experience of lagging behind other states in economic terms has put the wisdom of this approach in doubt. Whether Indiana's future place in the world economy requires a new approach has been a topic of productive debate during the 2004 race for governor. That the future of justice in our state requires a new approach to attracting and keeping bright and energetic people to Indiana's bench seems obvious. As Governor Conrad Baker declared in 1869: "A cheap judiciary will in the long run prove to be more expensive to the public than one that is adequately paid."<sup>20</sup>

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19. *Id.* at 86.

20. JOURNAL OF THE INDIANA GENERAL ASSEMBLY, 46th Sess., at 61 (1869).







# AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 2003\*

KEVIN W. BETZ\*\*  
MARK J. CRANDLEY\*\*\*  
P. JASON STEPHENSON\*\*\*\*

The Indiana Supreme Court continued its march to become “a marketplace of reasoned, scholarly judgment” in 2003.<sup>1</sup> As in 2002, this process was greatly aided by the constitutional change in the court’s jurisdiction that gave the court the power to select almost all of the cases it hears and freed the court from the mandatory criminal appeals that had flooded its docket. The jurisdictional change was intended to allow the court to serve its role as a true court of last resort. In 2002, the court’s docket showed the obvious effects of this jurisdictional change, as the court decided more civil cases and was more willing to grant transfer petitions than in previous years. In 2003, the jurisdictional change had some more subtle effects on the court’s workload.

First, the court handed down a remarkable number of difficult, lengthy and sophisticated opinions that were fitting for a “marketplace of reasoned, scholarly judgment.” For instance, the court handed down noteworthy and high-profile opinions addressing issues such as the ability of Indiana cities to sue gun manufacturers;<sup>2</sup> the interplay between Medicaid health benefits, the right to an

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\* The Tables presented in this Article are patterned after the annual statistics of the U.S. Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these Tables can be found at Louis Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 301 (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review*.

We thank Barnes & Thornburg for its gracious willingness to devote the time, energy, and resources of its law firm to allow a project such as this to be accomplished. As is appropriate, credit for the idea for this project goes to Chief Justice Shepard; but, of course, any errors or omissions belong to his former law clerk.

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1. Randall T. Shepard, *Why Changing the Supreme Court’s Mandatory Jurisdiction Is Critical to Lawyers and Clients*, 33 IND. L. REV. 1101, 1108 (2000) (quoting *Proposition 2*, INDIANAPOLIS STAR, Oct. 2, 1988, at F2).

2. *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003).



abortion, and the Indiana constitution;<sup>3</sup> the constitutionality of Indiana's punitive damages statute under the Indiana constitution's takings clauses;<sup>4</sup> and the effect of the governor's failure to properly return a veto.<sup>5</sup> An example of the sophistication of the court's workload in 2003 is its opinion in *Peterson v. Borst*, which addressed the lawfulness of the redistricting of Marion County.<sup>6</sup> The court handed down its opinion on March 19, 2003 and did so under the pressure of a May primary that would have been affected by the redistricting.<sup>7</sup> After the per curiam opinion announced it would reverse the redistricting plan, the court set out to provide a remedy under the press of the May primary date by actually "redrawing the district lines" itself.<sup>8</sup> A hint of the amount of effort the court put into the case is provided by the fact that the *Borst* opinion includes five appendixes tabulating different aspects of the redistricting.<sup>9</sup> The court's ability to deal with these issues in a rich and sophisticated manner is precisely why the court pressed for a change in its jurisdiction.

Second, as one would expect from a true court of last resort, fractures in the court's voting patterns are becoming more apparent. For instance, the number of unanimous (5-0) opinions dropped from 74.2% in 2002 to 61.1% in 2003. Moreover, the number of opinions drawing at least one dissent rose for the fourth straight year and at least one justice dissented in 27.8% of the court's cases. This dissonance can be seen even among individual justices. For instance, the Chief Justice and Justice Rucker agreed in only 69.2% of the court's opinions and in only 61.5% of civil cases, while Justices Rucker and Sullivan agreed in only 68.9% of all opinions and 64.2% in civil cases. By contrast, the least amount of agreement in all cases for 2002 was shared by Justices Sullivan and Dickson at 76.1%. In fact, three pairs of justices agreed in less than 70% of the court's civil cases: Chief Justice Shepard and Justice Rucker; Justice Sullivan and Justice Rucker; and Justice Sullivan and Justice Dickson.

Third, as the court has taken on an increasingly challenging workload, it has become less likely to affirm the cases that come before it. The rate by which the court affirms opinions has dropped for the third straight year. In 2001, the court affirmed in 55.8% of the cases. In 2002 and 2003, the court did not have a significant number of mandatory criminal appeals and affirmed in only 40.4% and 27% of its cases, respectively. It goes without saying that as the court has a greater say in which cases to take, it is more likely to take those in which it sees error.

Finally, the change in the court's jurisdiction is apparently also having an affect on the legal profession's perception of the petition to transfer, as the number of petitions to transfer skyrocketed from 655 in 2002 to 871 in 2003.

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3. *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003).

4. *Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003).

5. *D&M Healthcare, Inc. v. Kernan*, 800 N.E.2d 898, 909 (Ind. 2003).

6. 786 N.E.2d 668 (Ind. 2003).

7. *Id.*

8. *Id.* at 677.

9. *Id.*



The following is a description of the highlights from each table.

**Table A.** In 2003, the Indiana Supreme Court issued 88 opinions that were authored by an individual justice. The number of cases decided by the court has decreased dramatically. The court decided only 108 cases during the 2003 term. In 2002, 2001 and 2000, the court issued 190, 187 and 192 opinions, respectively. This drop occurred at least in part because of the sophistication and sheer girth of many of the cases the court handed down in 2003. Drafting opinions like the court’s 32-page slip opinion in the *City of Gary* gun control case or the unique efforts in *Peterson v. Borst* undoubtedly commands a great deal of the court’s attention. Another possible explanation for the drop in the number of opinions is the court’s commitment to hearing oral argument in virtually every case.<sup>10</sup> This commitment also commands the court’s attention in both the argument and in the preparation for argument.

The impact of the amendment to Indiana’s constitution changing the court’s mandatory review of criminal cases to only those in which the death penalty is imposed was abundantly clear this year. The court, freed from numerous mandatory criminal appeals, considered a much greater percentage of civil cases. Of the 108 opinions issued in 2003, 63.9% (69) were civil opinions. In previous years, only 25% to 35% of the opinions issued by the court dealt with civil issues. The number of criminal appeals dropped this year from 106 in 2002 to 39 in 2003. The total number of discretionary appeals declined to 28% in 2004 from 55% in 2003.

Chief Justice Shepard issued the most opinions again this year, issuing 24 opinions. The court as a whole issued 20 per curiam opinions, all of which dealt with civil issues. In a change from previous years, nearly one quarter of these opinions dealt with matters other than attorney discipline decisions. The number of per curiam opinions is about the same as in previous years (24 in 2002 and 23 in 2001).

The number of dissents issued this year declined from 61 in 2002 to 47 in 2003. However, the decrease in the number of dissents from 2002 to 2003 does not demonstrate a change in the trend towards an increase in dissents first noted by this Article in 2001 because the percentage of opinions issued with dissents actually increased for 2003. In 2002, 32% of the opinions were issued with dissenting decisions. In 2003, that percentage increased to 43%. Justice Rucker, the newest member of the court, issued the greatest number of dissents, drafting 15 dissents. Justice Dickson was close behind Justice Rucker with 14 dissents.

**Table B-1.** For civil cases, Justices Boehm and Sullivan were the two justices most aligned at 85.3%. Justices Rucker and Dickson were next at 82.4%. Chief Justice Shepard and Justice Rucker were the least aligned at 61.5%. Justice Boehm was the most aligned with all other justices, and Justice Rucker was the least aligned.

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10. George T. Patton, Jr., *Appellate Civil Case Law Update*, RES GESTAE, Nov. 2002, at 19.



**Table B-2.** For criminal cases, Chief Justice Shepard and Justice Dickson were the most aligned pair of justices and were in agreement 92.3% of the time. Interestingly, Justice Rucker agreed with Justices Sullivan and Dickson in only 76.9% of the court's criminal cases, which tied for the least agreement. That is to say, not only did Justice Rucker lead the category for least agreement in criminal cases, but he did so with two other justices. As for criminal cases, Chief Justice Shepard was the most aligned with his fellow justices, while Justice Rucker was the least.

**Table B-3.** For all cases, Justices Boehm and Sullivan were the most aligned at 85%, which was down from the high of 90.5% shared by Chief Justice Shepard and Justice Sullivan in 2002. The two least aligned justices were Justices Sullivan and Rucker at 68.9%, followed closely by Chief Justice Shepard and Justice Rucker at 69.2%. Both of these numbers are decreases from the lowest level of agreement in 2002, which was the 76.1% disagreement between Justices Sullivan and Dickson.

Overall, Justice Boehm was the most aligned with his fellow justices, and Justice Rucker was the least aligned.

**Table C.** The court issued a smaller percentage of unanimous opinions in 2003 than either of the previous two years. In 2003, the court was unanimous in 66.1% of its cases. The court issued unanimous opinions in 69.1% of its cases in 2001 and 74.2% in 2002. This drop is directly attributable to the absence of mandatory direct criminal appeals. As mentioned, the number of opinions drawing at least one dissent continued to rise. In 2003, the number of cases with at least one dissent rose to 27.8%, up from 23.2% in 2002 and 18.5% in 2001. Cases decided in 2000 and 1999 drew dissents in only 12.4% of the decisions.

**Table D.** The court continues to issue a relatively high number of 3-2 split decisions. In 2003, the raw number of 3-2 split decisions actually dropped to 18, which was down from the 26 split decisions in 2002 and the 27 split decisions in 2001. However, as previously mentioned, the overall number of cases decided dropped noticeably in 2003, and as such the raw number of 3-2 decisions dropped in turn. As was the case in 2002, Chief Justice Shepard continues to be in the majority for almost all of the court's split opinions. In fact, the Chief Justice was in the majority in all but three of the 3-2 opinions. He was in the majority in 19 of the 26 split opinions in 2002. Chief Justice Shepard is clearly a pivotal "swing vote."

**Table E-1.** Overall, the court affirmed cases only 27% of the time. This percentage dropped from 2002 in large part because of the virtual absence of mandatory criminal appeals affirmed. Civil appeals were affirmed only 14.9% of the time and nonmandatory criminal appeals were affirmed only 17.6% of the time.

**Table E-2.** The number of civil petitions granted transfer by the court continued to rise in 2003. The court granted 63 civil petitions in 2003, an increase from the



59 in 2002 and 34 in 2001. In 2003, a civil petition to transfer stood a 21.2% chance of being granted, and a criminal petition stood about a 7.5% chance of being granted. Juvenile petitions to transfer stood a 10% chance of being granted.

**Table F.** The emphasis on civil opinion is also demonstrated by Table F. Table F categorizes the subject matter of decisions addressed by the court. The majority of the categories in Table F track civil issues. In 2003, despite a dramatic decrease in the number of total decisions, the number of cases addressing discrete civil issues remained roughly the same or increased. For example, the number of decisions addressing negligence or personal injury issues increased in 2003 to 13 from 7 in 2002. There were some decreases in the civil issues addressed—the number of decisions addressing contract issues declined to 2 in 2003 from 6 in 2002. The court also decided 5 death penalty cases, affirming 3 and reversing 2.



**TABLE A**  
**OPINIONS<sup>a</sup>**

	OPINIONS OF COURT <sup>b</sup>			CONCURRENCES <sup>c</sup>			DISSENTS <sup>d</sup>		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J.	16	8	24	3	6	9	0	3	3
Dickson, J. <sup>e</sup>	7	10	17	0	2	2	2	12	14
Sullivan, J. <sup>e</sup>	9	13	22	1	2	3	1	7	8
Boehm, J. <sup>e</sup>	4	14	18	1	1	2	3	4	7
Rucker, J. <sup>e</sup>	3	4	7	1	3	4	4	11	15
Per Curiam	0	20	20						
Total	39	69	108	6	14	20	10	37	47

<sup>a</sup> These are opinions and votes on opinions by each justice and in per curiam in the 2003 term. The Indiana Supreme Court is unique because it is the only supreme court to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The chief justice does not have any power to control the assignments other than as a member of the majority. See Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209, 213 (1990). The order of discussion and voting is started by the most junior member of the court and follows reverse seniority. See *id.* at 210.

<sup>b</sup> This is only a counting of full opinions written by each justice. Plurality opinions that announce the judgment of the court are counted as opinions of the court. It includes opinions on civil, criminal, and original actions.

<sup>c</sup> This category includes both written concurrences, joining in written concurrence, and votes to concur in result only.

<sup>d</sup> This category includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

<sup>e</sup> Justices declined to participate in the following causes: *D&M Healthcare, Inc. v. Kernan*, 800 N.E.2d 898 (Ind. 2003) (Sullivan, J., not participating); *Murray v. Conseco, Inc.*, 795 N.E.2d 454 (Ind. 2003) (Shepard, C.J., not participating); *In re Hailey*, 792 N.E.2d 851 (Ind. 2003) (Shepard, C.J., not participating); *In re Keller*, 792 N.E.2d 865 (Ind. 2003) (Shepard, C.J., not participating); *In re Wilkins*, 782 N.E.2d 985 (Ind. 2003) (Rucker, J., not participating).



TABLE B-1  
VOTING ALIGNMENTS FOR CIVIL CASES<sup>f</sup>

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		46	51	53	40
	S		2	2	1	0
	D	---	48	53	54	40
	N		66	65	66	65
	P		72.7%	81.5%	81.8%	61.5%
Dickson, J.	O	46		47	52	48
	S	2		0	0	8
	D	48	---	47	52	56
	N	66		68	69	68
	P	72.7%		69.1%	75.4%	82.4%
Sullivan, J.	O	51	47		56	43
	S	2	0		2	0
	D	53	47	---	58	43
	N	65	68		68	67
	P	81.5%	69.1%		85.3%	64.2%
Boehm, J.	O	53	52	56		47
	S	1	0	2		1
	D	54	52	58	---	48
	N	66	69	68		68
	P	81.8%	75.4%	85.3%		70.6%
Rucker, J.	O	40	48	43	47	
	S	0	8	0	1	
	D	40	56	43	48	---
	N	65	68	67	68	
	P	61.5%	82.4%	64.2%	70.6%	

<sup>f</sup> This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases. For example, in the top set of numbers for Chief Justice Shepard, 46 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a civil case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- “O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- “S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- “D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- “N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- “P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-2  
VOTING ALIGNMENTS FOR CRIMINAL CASES<sup>2</sup>

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		36	35	35	32
	S		0	0	0	0
	D	---	36	35	35	32
	N		39	39	39	39
	P		92.3%	89.7%	89.7%	82.1%
Dickson, J.	O	36		34	33	30
	S	0		0	0	0
	D	36	---	34	33	30
	N	39		39	39	39
	P	92.3%		87.2%	84.6%	76.9%
Sullivan, J.	O	35	34		33	31
	S	0	0		0	0
	D	35	34	---	33	31
	N	39	39		39	39
	P	89.7%	87.2%		84.6%	79.5%
Boehm, J.	O	35	33	33		31
	S	0	0	0		2
	D	35	33	33	---	33
	N	39	39	39		39
	P	89.7%	84.6%	84.6%		84.6%
Rucker, J.	O	32	30	31	31	
	S	0	0	0	2	
	D	32	30	31	33	---
	N	39	39	39	39	
	P	82.1%	76.9%	79.5%	84.6%	

<sup>2</sup> This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only criminal cases. For example, in the top set of numbers for Chief Justice Shepard, 36 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a criminal case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”



TABLE B-3  
VOTING ALIGNMENTS FOR ALL CASES<sup>h</sup>

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		82	86	88	72
	S		2	2	1	0
	D	---	84	88	89	72
	N		105	104	105	104
	P		80.0%	84.6%	84.8 %	69.2 %
Dickson, J.	O	82		81	85	80
	S	2		0	0	10
	D	84	---	81	85	90
	N	105		107	108	107
	P	80.0%		75.7%	78.7 %	84.1 %
Sullivan, J.	O	86	81		89	73
	S	2	0		2	0
	D	88	81	---	91	73
	N	104	107		107	106
	P	84.6%	75.7%		85.0 %	68.9 %
Boehm, J.	O	88	85	89		78
	S	1	0	2		3
	D	89	85	91	---	81
	N	105	108	107		107
	P	84.8%	78.7%	85.0%		75.7 %
Rucker, J.	O	72	80	73	78	
	S	0	10	0	3	
	D	72	90	73	81	--
	N	104	107	106	107	
	P	69.2%	84.1%	68.9 %	75.7%	

<sup>h</sup> This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. For example, in the top set of numbers for Chief Justice Shepard, 82 is the total number of times Chief Justice Shepard and Justice Dickson agreed in all full majority opinions written by the court in 2003. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- “O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- “S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- “D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- “N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- “P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE C

UNANIMITY

NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES<sup>i</sup>

Unanimous <sup>j</sup>			Unanimous with Concurrence <sup>k</sup>			Opinions with Dissent			Total
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
29	37	66 (61.1%)	3	9	12 (11.1%)	7	23	30 (27.8%)	108

<sup>i</sup> This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and all concur, it is still considered unanimous. It also tracks the percentage of overall opinions with concurrence and overall opinions with dissent.

<sup>j</sup> A decision is considered unanimous only when all justices participating in the case voted to concur in the court's opinion as well as its judgment. When one or more justices concurred in the result but not in the opinion, the case is not considered unanimous.

<sup>k</sup> A decision is listed in this column if one or more justices concurred in the result but not in the opinion of the court or wrote a concurrence, and there were no dissents.



TABLE D  
3-2 DECISIONS<sup>1</sup>

Justices Constituting the Majority	Number of Opinions <sup>m</sup>
1. Shepard, C.J., Dickson, J., Boehm, J.	1
2. Shepard, C.J., Dickson, J., Rucker, J.	1
3. Shepard, C.J., Sullivan, J., Boehm, J.	10
4. Shepard, C.J., Dickson, J., Sullivan, J.	1
5. Shepard, C.J., Boehm, J., Dickson, J., Rucker, J., Sullivan, J.	1
6. Shepard, C.J., Dickson, J.	1
7. Boehm, J., Dickson, J., Rucker, J.	1
8. Dickson, J., Sullivan, J., Rucker, J.	2
Total <sup>n</sup>	18

<sup>1</sup> This Table concerns only decisions rendered by full opinion. An opinion is counted as a 3-2 decision if two justices voted to decide the case in a manner different from that of the majority of the court.

<sup>m</sup> This column lists the number of times each three-justice group constituted the majority in a 3-2 decision.

<sup>n</sup> The 2003 term's 3-2 decisions were:

1. Shepard, C.J., Dickson, J., Boehm, J.: *Chaffee v. Seslar*, 786 N.E.2d 705 (Ind. 2003) (Dickson, J.).
2. Shepard, C.J., Dickson, J., Rucker, J.: *Neal v. DeKalb County Div. of Family & Children*, 796 N.E.2d 280 (Ind. 2003) (Rucker, J.).
3. Shepard, C.J., Sullivan, J., Boehm, J.: *Springer v. State*, 798 N.E.2d 431 (Ind. 2003) (Sullivan, J.); *Morgen v. Ford Motor Co.*, 797 N.E.2d 1146 (Ind. 2003) (Sullivan, J.); *State v. Dugan*, 793 N.E.2d 1034 (Ind. 2003) (Shepard, C.J.); *Tankersley v. Parkview Hosp., Inc.*, 791 N.E.2d 201 (Ind. 2003) (Shepard, C.J.); *Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003) (Boehm, J.); *AlliedSignal, Inc. v. Herring*, 785 N.E.2d 1090 (Ind. 2003) (Sullivan, J.); *AlliedSignal, Inc. v. Ott*, 785 N.E.2d 1068 (Ind. 2003) (Sullivan, J.); *Black v. A.C. & S., Inc.*, 785 N.E.2d 1084 (Ind. 2003) (Sullivan, J.); *Harris v. A.C. & S., Inc.*, 785 N.E.2d 1087 (Ind. 2003) (Sullivan, J.); *Jurich v. Garlock, Inc.*, 785 N.E.2d 1093 (Ind. 2003) (Sullivan, J.).
4. Shepard, C.J., Dickson, J., Sullivan, J.: *Williams v. State*, 793 N.E.2d 1019 (Ind. 2003) (Sullivan, J.).
5. Shepard, C.J., Boehm, J., Dickson, J., Rucker, J., Sullivan, J.: *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003) (Sullivan, J.) (Shepard, C.J. and Dickson, J. concurring in Part I; Boehm, J. and Rucker, J. concurring in Part II).
6. Shepard, C.J., Dickson, J.: *In re Wilkins*, 782 N.E.2d 985 (Ind. 2003) (Dickson, J.).
7. Boehm, J., Dickson, J., Rucker, J.: *Ind. Dep't of Env'tl. Mgmt. v. Twin Eagle L.L.C.*, 798 N.E.2d 839 (Ind. 2003) (Boehm, J.).
8. Dickson, J., Sullivan, J., Rucker, J.: *Embry v. O'Bannon*, 798 N.E.2d 157 (Ind. 2003) (Dickson, J.); *Reeder v. Harper*, 788 N.E.2d 1236 (Ind. 2003) (Rucker, J.).

**TABLE E-1**  
**DISPOSITION OF CASES REVIEWED BY TRANSFER**  
**AND DIRECT APPEALS<sup>o</sup>**

	Reversed or Vacated <sup>p</sup>	Affirmed	Total
Civil Appeals Accepted for Transfer	40 (85.1%)	7 (14.9%)	47
Direct Civil Appeals	8 (88.9%)	1 (11.1%)	9
Criminal Appeals Accepted for Transfer	14 (82.4%)	3 (17.6%)	17
Direct Criminal Appeals	3 (18.8%)	13 (81.2%)	16
Total	65 (73%)	24 (27%)	89 <sup>q</sup>

<sup>o</sup> Direct criminal appeals are cases in which the trial court imposed a death sentence. *See* IND. CONST. art. VII, § 4. Thus, direct criminal appeals are those directly from the trial court. A civil appeal may also be direct from the trial court. *See* IND. APP. R. 56, 63 (pursuant to Rules of Procedure for Original Actions). All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. *See* IND. APP. R. 57.

<sup>p</sup> Generally, the term "vacate" is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, and the term "reverse" is used when the court overrules a trial court decision. A point to consider in reviewing this Table is that the court technically "vacates" every court of appeals opinion that is accepted for transfer, but may only disagree with a small portion of the reasoning and still agree with the result. *See* IND. APP. R. 58(A). As a practical matter, "reverse" or "vacate" simply represents any action by the court that does not affirm the trial court or court of appeals opinion.

<sup>q</sup> This does not include 11 attorney and judicial discipline opinions or three opinions related to certified questions. These opinions did not reverse, vacate, or affirm any other court's decision. This also does not include six opinions which considered petitions for post-conviction relief.



**TABLE E-2**  
**DISPOSITION OF PETITIONS TO TRANSFER**  
**TO SUPREME COURT IN 2003<sup>r</sup>**

	Denied or Dismissed	Granted	Total
Petitions to Transfer			
Civil <sup>s</sup>	234 (78.8%)	63 (21.2%)	297
Criminal <sup>t</sup>	494 (92.5%)	40 (7.5%)	534
Juvenile	36 (90.0%)	4 (10.0%)	40
Total	764 (87.7%)	107 (12.3%)	871

<sup>r</sup> This Table analyzes the disposition of petitions to transfer by the court. *See* IND. APP. R. 58(A).  
<sup>s</sup> This also includes petitions to transfer in tax cases and workers' compensation cases.  
<sup>t</sup> This also includes petitions to transfer in post-conviction relief cases.

**TABLE F**  
**SUBJECT AREAS OF SELECTED DISPOSITIONS**  
**WITH FULL OPINIONS<sup>u</sup>**

<b>Original Actions</b>	<b>Number</b>
• Certified Questions	3 <sup>v</sup>
• Writs of Mandamus or Prohibition	0
• Attorney Discipline	10 <sup>w</sup>
• Judicial Discipline	2 <sup>x</sup>
<b>Criminal</b>	
• Death Penalty	5 <sup>y</sup>
• Fourth Amendment or Search and Seizure	2 <sup>z</sup>
• Writ of Habeas Corpus	0
<b>Emergency Appeals to the Supreme Court</b>	1 <sup>aa</sup>
Trusts, Estates, or Probate	0
Real Estate or Real Property	3 <sup>bb</sup>
Personal Property	0
Landlord-Tenant	1 <sup>cc</sup>
Divorce or Child Support	7 <sup>dd</sup>
Children in Need of Services (CHINS)	0
Paternity	2 <sup>ee</sup>
Product Liability or Strict Liability	2 <sup>ff</sup>
Negligence or Personal Injury	13 <sup>gg</sup>
Invasion of Privacy	0
Medical Malpractice	1 <sup>hh</sup>
Indiana Tort Claims Act	2 <sup>ii</sup>
Statute of Limitations or Statute of Repose	4 <sup>jj</sup>
Tax, Department of State Revenue, or State Board of Tax Commissioners	5 <sup>kk</sup>
Contracts	2 <sup>ll</sup>
Corporate Law or the Indiana Business Corporation Law	3 <sup>mm</sup>
Uniform Commercial Code	0
Banking Law	0
Employment Law	0
Insurance Law	3 <sup>nn</sup>
Environmental Law	3 <sup>oo</sup>
Consumer Law	0
Worker's Compensation	3 <sup>pp</sup>
Arbitration	0
Administrative Law	1 <sup>qq</sup>
First Amendment, Open Door Law, or Public Records Law	0
Full Faith and Credit	0
Eleventh Amendment	0
Civil Rights	3 <sup>rr</sup>
Indiana Constitution	20 <sup>ss</sup>

<sup>u</sup> This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed and how many times it did so in 2003. It is also a quick-reference guide to court rulings for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas. Also, any attorney discipline case resolved by order (as opposed to an opinion) was not considered in preparing this Table.



<sup>v</sup> Simon v. United States, 794 N.E.2d 1087 (Ind. 2003); Majors v. Abell, 792 N.E.2d 22 (Ind. 2003); Majors v. Abell, 785 N.E.2d 226 (Ind. 2003).

<sup>w</sup> In re Caputi, 798 N.E.2d 850 (Ind. 2003); In re Contempt of Fox, 796 N.E.2d 1186 (Ind. 2003); In re Stochel, 792 N.E.2d 874 (Ind. 2003); In re Richardson, 792 N.E.2d 871 (Ind. 2003); In re Keller, 792 N.E.2d 865 (Ind. 2003); In re Haile, 792 N.E.2d 851 (Ind. 2003); In re Anonymous, 787 N.E.2d 883 (Ind. 2003); In re Anonymous, 786 N.E.2d 1185 (Ind. 2003); In re Anonymous, 783 N.E.2d 1130 (Ind. 2003); In re Wilkins, 782 N.E.2d 985 (Ind. 2003).

<sup>x</sup> In re Spencer, 798 N.E.2d 175 (Ind. 2003); In re Danikolas, 783 N.E.2d 687 (Ind. 2003).

<sup>y</sup> Allen v. State, Case No. 49S00-0303-SD-122, 2003 Ind. LEXIS 581 (Ind. July 15, 2003) (affirming); Williams v. State, 793 N.E.2d 1019 (Ind. 2003) (affirming); Kubsch v. State, 784 N.E.2d 905 (Ind. 2003) (reversing); State v. Dye, 784 N.E.2d 469 (Ind. 2003) (affirming); Overstreet v. State, 783 N.E.2d 1140 (Ind. 2003) (affirming).

<sup>z</sup> Kubsch v. State, 784 N.E.2d 905 (Ind. 2003); Jones v. State, 783 N.E.2d 1132 (Ind. 2003).

<sup>aa</sup> Peterson v. Borst, 786 N.E.2d 668 (Ind. 2003).

<sup>bb</sup> State v. Bishop, 800 N.E.2d 918 (Ind. 2003); Dvorak v. City of Bloomington, 796 N.E.2d 236 (Ind. 2003); Mun. South Bend v. Kimsey, 781 N.E.2d 683 (Ind. 2003).

<sup>cc</sup> Lae v. Householder, 789 N.E.2d 481 (Ind. 2003).

<sup>dd</sup> Cohoon v. Cohoon, 784 N.E.2d 904 (Ind. 2003).

<sup>ee</sup> In re Adoption of Infant Child Baxter, 799 N.E.2d 1057 (Ind. 2003); Neal v. DeKalb County Div. Family & Children, 796 N.E.2d 280 (Ind. 2003).

<sup>ff</sup> Morgan v. Ford Motor Co., 797 N.E.2d 1146 (Ind. 2003); King v. Northeast Sec., Inc., 790 N.E.2d 474 (Ind. 2003).

<sup>gg</sup> City of Gary ex rel. King v. Smith & Wesson, Corp., 801 N.E.2d 1222 (Ind. 2003); Paragon Family Rest. v. Bartolini, 799 N.E.2d 1048 (Ind. 2003); Coslett v. Weddle Bros. Constr. Co., Inc., 798 N.E.2d 859 (Ind. 2003); Cook v. Whitsell-Sherman, 796 N.E.2d 271 (Ind. 2003); Brazauskas v. Fort Wayne-South Bend Diocese, Inc., 796 N.E.2d 286 (Ind. 2003); Smith v. Baxter, 796 N.E.2d 242 (Ind. 2003); Young v. Tri-etch, Inc., 790 N.E.2d 456 (Ind. 2003); Chaffee v. Seslar, 786 N.E.2d 705 (Ind. 2003); Jurich v. Garlock, Inc., 785 N.E.2d 1093 (Ind. 2003); AlliedSignal, Inc. v. Herring, 785 N.E.2d 1090 (Ind. 2003); Harris v. A.C.&S., Inc., 785 N.E.2d 1087 (Ind. 2003); AlliedSignal, Inc. v. Ott, 785 N.E.2d 1068 (Ind. 2003); Bourbon Mini-Mart, Inc. v. Gast Fuel & Servs., Inc., 783 N.E.2d 253 (Ind. 2003).

<sup>hh</sup> Chaffee v. Seslar, 786 N.E.2d 705 (Ind. 2003).

<sup>ii</sup> King v. Northeast Sec., Inc., 790 N.E.2d 474 (Ind. 2003); Bushong v. Williamson, 790 N.E.2d 467 (Ind. 2003).

<sup>jj</sup> Jurich v. Garlock, Inc., 785 N.E.2d 1093 (Ind. 2003); AlliedSignal, Inc. v. Herring, 785 N.E.2d 1090 (Ind. 2003); Harris v. A.C.&S., Inc., 785 N.E.2d 1087 (Ind. 2003); AlliedSignal, Inc. v. Ott, 785 N.E.2d 1068 (Ind. 2003).

<sup>kk</sup> State Bd. of Tax Comm'rs v. Inland Container Corp., 785 N.E.2d 227 (Ind. 2003); Apple Glen Crossing, L.L.C. v. Trademark Retail, Inc., 784 N.E.2d 484 (Ind. 2003); State Bd. of Tax Comm'rs v. Ispat Inland, Inc., 784 N.E.2d 477 (Ind. 2003); Tippacanoe County v. Ind. Mfr's Ass'n, 784 N.E.2d 463 (Ind. 2003); Ind. Dep't of Revenue v. Interstate Warehousing, Inc., 783 N.E.2d 248 (Ind. 2003).

<sup>ll</sup> Young v. Tri-etch, Inc., 790 N.E.2d 456 (Ind. 2003); Apple Glen Crossing, Inc. v. Trademark Retail, L.L.C., 784 N.E.2d 484 (Ind. 2003).

<sup>mm</sup> F.B.I. Farms, Inc. v. Moore, 798 N.E.2d 440 (Ind. 2003); Murray v. Consecro, Inc., 795 N.E.2d 454 (Ind. 2003); Apple Glen Crossing, Inc. v. Trademark Retail, Inc., 784 N.E.2d 484 (Ind. 2003).

<sup>nn</sup> Humphreys v. Clinic for Women, Inc., 796 N.E.2d 247 (Ind. 2003); Tankersley v. Parkview Hosp., Inc., 791 N.E.2d 201 (Ind. 2003); Smith v. Cincinnati Ins. Co., 790 N.E.2d 460 (Ind. 2003).

<sup>oo</sup> Ind. Dep't of Env'tl. Mgmt. v. Twin Eagle L.L.C., 798 N.E.2d 839 (Ind. 2003); AlliedSignal, Inc. v. Ott, 785 N.E.2d 1068 (Ind. 2003); Bourbon Mini-Mart, Inc. v. Gast Fuel and Servs., Inc., 783 N.E.2d 253 (Ind. 2003).

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<sup>pp</sup> Wernle, Ristine & Ayers v. Yund, 790 N.E.2d 992 (Ind. 2003); Milledge v. The Oaks, 784 N.E.2d 926 (Ind. 2003); Sims v. U.S. Fid. & Guar. Co., 782 N.E.2d 345 (Ind. 2003).

<sup>qq</sup> Ind. Dep't of Envtl. Mgmt. v. Twin Eagle L.L.C., 798 N.E.2d 839 (Ind. 2003).

<sup>rr</sup> Finger v. State, 799 N.E.2d 528 (Ind. 2003); Smith v. Cincinnati Ins. Co., 790 N.E.2d 460 (Ind. 2003); Peterson v. Borst, 786 N.E.2d 668 (Ind. 2003).

<sup>ss</sup> City of Gary *ex rel.* King v. Smith & Wesson, Corp., 801 N.E.2d 1222 (Ind. 2003); D&M Healthcare, Inc. v. Kernan, 800 N.E.2d 898 (Ind. 2003); Finger v. State, 799 N.E.2d 528 (Ind. 2003); Embry v. O'Bannon, 798 N.E.2d 157 (Ind. 2003); Humphreys v. Clinic for Women, Inc., 796 N.E.2d 247 (Ind. 2003); Dvorak v. City of Bloomington, 796 N.E.2d 236 (Ind. 2003); Malinski v. State, 794 N.E.2d 1071 (Ind. 2003); Doe v. O'Connor, 790 N.E.2d 985 (Ind. 2003); Miller v. State, 790 N.E.2d 437 (Ind. 2003); Cheatham v. Pohle, 789 N.E.2d 467 (Ind. 2003); Holden v. State, 788 N.E.2d 1253 (Ind. 2003); Peterson v. Borst, 786 N.E.2d 668 (Ind. 2003); Estate of Heck *ex rel.* Heck v. Stoffer, 786 N.E.2d 265 (Ind. 2003); Jurich v. Garlock, Inc., 785 N.E.2d 1093 (Ind. 2003); AlliedSignal, Inc. v. Herring, 785 N.E.2d 1090 (Ind. 2003); Harris v. A.C.&S., Inc., 785 N.E.2d 1087 (Ind. 2003); AlliedSignal, Inc. v. Ott, 785 N.E.2d 1068 (Ind. 2003); Dep't of Local Gov't Fin. v. Griffin, 784 N.E.2d 448 (Ind. 2003); Overstreet v. State, 783 N.E.2d 1140 (Ind. 2003); Sims v. U.S. Fid. & Guar. Co., 782 N.E.2d 345 (Ind. 2003).



# APPELLATE PROCEDURE

DOUGLAS E. CRESSLER\*

## INTRODUCTION

This Article examines opinions, orders, and other developments in the area of state appellate procedure in Indiana during the most recent reporting period.<sup>1</sup> In Part I of the Article, rule amendments of interest to the appellate practitioner are examined. Part II contains a discussion of important published decisions issued during the reporting period. Lastly, in Part II, miscellaneous developments of possible interest are highlighted.

## I. RULE AMENDMENTS

By order dated July 1, 2003, the Indiana Supreme Court made several changes to the rules governing appellate procedure in Indiana.<sup>2</sup> These changes, discussed below, went into effect January 1, 2004.<sup>3</sup>

### *A. Filing Date for Appellant's Case Summary in Interlocutory Appeals Clarified*

As reported in last year's survey article, the Appellate Practice Section of the Indiana State Bar Association made two specific recommendations to the Supreme Court Committee on Rules of Practice and Procedure.<sup>4</sup> The committee and supreme court agreed to address one of them—a proposal to clarify the date for filing the appellant's case summary in discretionary interlocutory appeals. The appellant's case summary provides important information about the appeal to the appellate court and serves as the appearance form for the appellant.<sup>5</sup>

Appellate Rule 15(B), which governs the procedures for filing the appellant's case summary, is shown below in both its pre- and post-amendment form. New language is shown with underscoring and deleted language is shown as stricken:

**B. Date due.** The Appellant's Case Summary shall be filed within thirty (30) days of the filing of the Notice of Appeal or, in the case of a Discretionary Interlocutory Appeal ~~an interlocutory appeal~~ under Rule 14(B)(2), the Appellant's Case Summary shall be filed at the time of the motion requesting permission to file the interlocutory appeal is filed in the Court of Appeals. ~~at the same time as the filing of either the Notice~~

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1. This Article covers the time period from October 1, 2002 through September 30, 2003.

2. See Order Amending Rules of Appellate Procedure (Ind. July 1, 2003) (No. 94S00-0307-MS-290).

3. *Id.* at 4.

4. See Douglas E. Cressler, *Appellate Procedure*, 36 IND. L. REV. 935, 938-39 (2003).

5. See IND. APP. R. 15(C), 16(A).

~~of Appeal with the trial court clerk or the motion to the Court of Appeals requesting permission to file an interlocutory appeal.~~<sup>6</sup>

Discretionary interlocutory appeals involve trial court orders that are neither final judgments nor orders otherwise appealable as a matter of right pursuant to Appellate Rule 14(A). In order to appeal such orders, the appealing party must obtain the permission of both the trial court and the court of appeals.<sup>7</sup> Appellate Rule 15(B), as amended, now makes clear that an appellant's case summary shall be filed at the same time as the motion seeking permission of the appellate court to bring the discretionary interlocutory appeal.<sup>8</sup> In all other types of appeals, the appellant's case summary remains due within thirty days of the filing of the notice of appeal.

Appellate Rule 15(D)(4) was also amended to be consistent with the change to Appellate Rule 15(B) discussed above.<sup>9</sup> Specifically, that rule now states the notice of appeal need not be an attachment to the appellant's case summary in discretionary interlocutory appeals. This was just a common-sense amendment, since no notice of appeal is filed in a discretionary interlocutory appeal until after the court of appeals accepts jurisdiction,<sup>10</sup> but the appellant's case summary is due along with the motion seeking permission from the court of appeals to bring the appeal.<sup>11</sup>

#### *B. Requirement of File-Marked Notice of Appeal Modified*

On further recommendation from the rules committee, the supreme court also took action on a rule that has been troublesome for many appellate lawyers. Some explanation is helpful to understanding the concerns addressed in the amendment to Appellate Rule 9(A), which governs the procedures for filing the notice of appeal.

Appellate Rule 9(A)(1) requires the notice of appeal to be filed in the trial court and that copies be served on all parties of record and filed with the appellate court clerk. The appellate clerk has historically required that the copy filed with that office be file-marked with a filing date by the trial court. Although the rule did not actually state such a requirement, the appellate clerk imposed the requirement to ensure that the notice of appeal date on each case's chronological case summary was accurate. The problem arose from the interaction of this rule with Appellate Rule 24(B), which requires that documents must be served no later than the date they are filed. Applying Appellate Rule 24(B) together with the requirement imposed by the appellate clerk that it receive a file-marked copy of the notice of appeal resulted in appellants being obligated to obtain a file-marked notice of appeal from the trial court for same-day service on the appellate clerk.

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6. Order Amending Rules of Appellate Procedure, *supra* note 2, at 2.

7. See IND. APP. R. 14(B).

8. See IND. APP. R. 14(B)(2).

9. See Order Amending Rules of Appellate Procedure, *supra* note 2, at 2.

10. See IND. APP. R. 14(B)(3).

11. See IND. APP. R. 15(B) (as amended).



This requirement was viewed by some appellate attorneys as an unnecessary burden, especially if the attorney was litigating out-of-county.

Appellate Rule 9(A)(1), was amended as follows, again with additions shown underlined and deleted words being shown as stricken. Note that the term Clerk, when used alone and capitalized, refers to the appellate clerk.<sup>12</sup>

(1) *Appeals from Final Judgments.* A party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty (30) days after the entry of a Final Judgment. . . . ~~The Copies of the~~ Notice of Appeal, which need not be file stamped by the trial court clerk, shall be served on all parties of record in the trial court, ~~and filed with the Clerk-, and The Notice of Appeal shall also be served~~ upon the Attorney General in all Criminal Appeals and any appeals from a final judgment declaring a state statute unconstitutional in whole or part. (See Form # App. R. 9-1).<sup>13</sup>

As amended, the rule now expressly states that the copy of the notice of appeal served on the appellate clerk and counsel need not be file-marked by the trial court clerk.

The supreme court was not unmindful of the desirability of providing to the appellate clerk, at some point in time, a file-marked copy of the notice of appeal. The court thus amended Appellate Rule 15(D) in conjunction with the changes to Appellate Rules 15(B) and 9(A)(1). Appellate Rule 15(D) enumerates the attachments that must accompany the appellant's case summary. Subpart (4) identifies the notice of appeal as one of the required attachments. That provision was amended as follows:

(4) A file-stamped copy of the Notice of Appeal, except in Discretionary Interlocutory Appeals.<sup>14</sup>

In summary, the amendment to Appellate Rule 9(A)(1) expressly removed any requirement that the notice of appeal originally served on the appellate clerk be file-marked. Instead, as the amendment to Appellate Rule 15(D)(4) now provides, the copy of the notice of appeal accompanying the appellant's case summary must be file-marked. The appellant's case summary is generally filed with the appellate clerk within thirty days of the service of the notice of appeal, thus allowing appellant thirty days within which to obtain a file-marked copy of the notice of appeal.<sup>15</sup>

Appellate Rule 9(E) was also amended simply to conform to the new language of Appellate Rules 9(A) and 15(B):

**E. Payment of Filing Fee.** The appellant shall pay the Clerk the filing fee of \$250. No filing fee is required in an appeal prosecuted in *forma pauperis* or on behalf of a governmental unit. The filing fee shall be paid

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12. See IND. APP. R. 2(D).

13. Order Amending Rules of Appellate Procedure, *supra* note 2, at 1.

14. Order Amending Rules of Appellate Procedure, *supra* note 2, at 2.

15. See IND. APP. R. 15(B).

to the Clerk when the Notice of Appeal is served on the Clerk ~~filed in the trial court. The filing fee shall be accompanied by a copy of the Notice of Appeal. . . .~~<sup>16</sup>

### *C. Emergency Stay Procedures Toughened Up*

Also on the recommendation of the rules committee, the supreme court adopted significant changes to the rule governing requests for emergency stays in the court of appeals. The trial and appellate rules permit a party that has requested but been denied a stay of execution of a judgment in the trial court to petition the court of appeals for reconsideration of the stay issue.<sup>17</sup> Other than tendering a proposed order, the rules have never imposed any special requirements for obtaining an emergency stay from the court of appeals. However, the requirements for a motion seeking an emergency stay without notice to opposing counsel have been made more rigorous. The old and new versions of Appellate Rule 39(D) are shown below, with new language shown with underlining and deleted language shown as stricken:

**D. ~~Proposed Orders for Emergency Stays.~~** If an emergency stay without notice is requested, the moving party shall submit:

(1) an affidavit setting forth specific facts clearly establishing that immediate and irreparable injury, loss, or damage will result to the moving party before all other parties can be heard in opposition;

(2) a certificate from the attorney for the moving party setting forth in detail the efforts, if any, which have been made to give notice to the other parties and the reasons supporting his claims that notice should not be required; and

(3) a proposed order setting forth the remedy being requested.<sup>18</sup>

In connection with the changes to Appellate Rule 39(D), the supreme court also made two additions to the list of documents that must accompany any motion for stay in the court of appeals, listed under Appellate Rule 39(C):

(4) an attorney certificate evidencing the date, time, place and method of service made upon all other parties; and

(5) an attorney certificate setting forth in detail why all other parties should not be heard prior to the granting of said stay.<sup>19</sup>

These amendments constitute a change from existing appellate practice and indicate that obtaining a stay on an ex parte basis will be more procedurally

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16. Order Amending Rules of Appellate Procedure, *supra* note 2, at 2.

17. See IND. TRIAL R. 62(D)(1); IND. APP. R. 39(B).

18. See Order Amending Rules of Appellate Procedure, *supra* note 2, at 3.

19. *Id.*



demanding than in the past.

#### *D. Other*

The only other change to the appellate rules that went into effect on January 1, 2004 was a new requirement that a proof of appointment be attached to the appellant's case summary in appeals being taken by counsel on behalf of an indigent person.<sup>20</sup>

### II. DEVELOPMENTS IN THE CASE LAW

#### *A. The Resilience of Orders from the Court of Appeals and Taboo Appeal Bonds*

One of the most noteworthy opinions in the area of appellate procedure issued during the reporting period was *Marshall County Tax Awareness Committee v. Quivey*.<sup>21</sup> The decision included two holdings of significance to appellate practitioners.

The plaintiff-appellant committee in the Quivey appeal represented a group of property owners ("committee") opposed to the issuance of a public bond to finance school improvements in Marshall County. The defendant-appellees were the county auditor and Plymouth Community School Corporation ("school"), who were attempting to get the school bond issued. The county auditor determined that the committee had not accumulated enough valid signatures on a petition to defeat the issuance of the school bond.<sup>22</sup> A lawsuit ensued. The committee challenged the auditor's conclusion and sought to enjoin the issuance of the school bond.<sup>23</sup>

Because it was challenging the validity of the financing of a public improvement project, the committee was bringing what is known as a "public lawsuit."<sup>24</sup> Public lawsuits are governed in significant part by statute. If a plaintiff in a public lawsuit is unable to demonstrate a substantial issue to be tried, the trial court is authorized by statute to dismiss the suit unless the plaintiff is able to post a surety bond.<sup>25</sup> In this case, the trial court determined the plaintiff committee had not demonstrated a substantial issue to be tried and ordered it to post a \$1 million bond or the case would be dismissed.<sup>26</sup>

The committee appealed the order. The school filed a motion asking the court of appeals to dismiss the appeal unless the committee posted an appeal bond. The court of appeals granted the motion and ordered the committee to post

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20. *Id.* at 2, 4.

21. 780 N.E.2d 380 (Ind. 2002), *reh'g denied*.

22. *Id.* at 382.

23. *Id.*

24. IND. CODE § 34-6-2-124 (2003).

25. *Id.* § 34-13-5-7.

26. *Marshall County Tax Awareness Comm.*, 780 N.E.2d at 383.

a \$1 million appeal bond or the appeal would be dismissed.<sup>27</sup>

Before the court of appeals could take any additional action, the Indiana Supreme Court stepped in and assumed jurisdiction by granting the school's emergency motion to transfer jurisdiction prior to consideration by the court of appeals.<sup>28</sup> The matter was fully briefed by the parties and the court issued its opinion. On the merits, the court found that the trial court had erred in finding no substantial issue to be tried and in subsequently finding that a statutory bond was required. It reversed the judgment of the trial court and remanded for further proceedings.<sup>29</sup> The supreme court also declared two principles of procedural law that are significant.

First, it held that any orders issued by the court of appeals remain valid even after the supreme court has granted transfer and assumed jurisdiction over an appeal. The court stated:

By rule, this Court's granting transfer has the effect of vacating the Court of Appeals' opinions. Ind. App. R. 58(A). However, the Rules of Appellate Procedure do not provide that the orders of the Court of Appeals are also vacated. When this Court assumes jurisdiction, it takes the case as it finds it, including any outstanding orders.<sup>30</sup>

This appears to be the first opinion to ever announce that procedural rule, although experienced appellate practitioners have probably understood jurisdictional transfers to operate in this manner. Suppose, for example, the court of appeals has issued a stay of execution of a judgment on motion of the appellant and then later issues its opinion. If the supreme court subsequently grants transfer of jurisdiction, the opinion of the court of appeals is vacated but not the order staying execution of the judgment. Under the Quivey holding, the stay of execution on the judgment, like any intermediate order of the court of appeals, remains in place unless separately overruled by the supreme court.

Applying this rule to the case at hand, the court determined that the order of the court of appeals requiring the committee to post an appeal bond was, under ordinary circumstances, viable. However, the court determined it would not dismiss the appeal because the court of appeals had erred in requiring the appellant to post an appeal bond.<sup>31</sup> Thus arises the second procedural holding of the case: the bringing of an appeal generally cannot be conditioned on the posting of a bond.<sup>32</sup>

Appellate Rule 18 expressly states, "No appeal bond shall be necessary to prosecute an appeal from any Final Judgment or appealable interlocutory order."<sup>33</sup> Moreover, as the opinion notes, article VII, section 6 of the Indiana Constitution

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27. *Id.* at 386.

28. *Id.* at 384 (citing IND. APP. R. 56(A)).

29. *Id.* at 386-87.

30. *Id.* at 386.

31. *Id.*

32. *Id.*

33. IND. APP. R. 18.



grants an absolute right to an appeal.<sup>34</sup> The supreme court concluded that simply because a statute authorizes a trial court to dismiss a case for failure to post a bond, that statute cannot serve as a basis for similarly dismissing an appeal.<sup>35</sup> If that were to be allowed, the difficulties of appealing an order from a trial court dismissing a public lawsuit following a determination of no substantial issue for trial would become almost insurmountable.

Of course, an appellant who fails to post a bond required by either the trial court or the court of appeals cannot prevent the appellee from executing on a money judgment. But the appellant's inability to post bond should not serve as an impediment to the bringing of an appeal.

The reader of *Quivey* is cautioned not to be confused by the fact that the word "bond" is used in three different contexts. First, there was the bond the school corporation wanted to issue to raise money for building improvements. Second, the opinion refers to the bond the plaintiff committee was statutorily required to post once the trial court determined there was no substantial issue for trial. Finally, there was the appeal bond the court of appeals erroneously required the appellant to post in order to bring the appeal.

### *B. Lessons Learned the Hard Way: Appeals Dismissed*

In most instances when an appeal is dismissed, the court of appeals simply issues an order and no one but the parties is ever aware of the dismissal. But on five occasions during the reporting period, the court of appeals published opinions or orders dismissing appeals. While the grounds for the dismissals did not always involve completely new principles of law, the situations were novel and significant enough to warrant publication by the court of appeals. These published dispositions also provide noteworthy practical guidance for the appellate practitioner and are discussed below.

1. *A Final Judgment Is "Entered" When File-Marked.*—Appellate Rule 9(A) requires that a party institute an appeal by filing a notice of appeal within thirty days "after the entry of" a final judgment.<sup>36</sup> Failure to file the notice of appeal within thirty days results in the forfeiture of the right to appeal.<sup>37</sup> In *Estate of Hester v. Hester*,<sup>38</sup> the trial court signed a final judgment order on August 28, it was file-marked August 28, and it was shown on the chronological case summary as filed on August 28.<sup>39</sup>

The appellant filed a notice of appeal four days late, and appellee filed a motion to dismiss with the court of appeals. In response to the motion, the appellant argued that the judgment was not "entered" for purposes of Appellate Rule 9 until a deputy clerk physically "entered" it on the chronological case

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34. *Marshall County Tax Awareness Comm.*, 780 N.E.2d at 386.

35. *Id.*

36. IND. APP. R. 9(A).

37. *Id.*

38. 780 N.E.2d 848 (Ind. Ct. App. 2002), *trans. denied*.

39. *Id.* at 849.

summary by typing the entry.<sup>40</sup> The appellant submitted an affidavit from a clerk stating that she received the case file and typed the order onto the chronological case summary on September 3, although the entry reflected the signature date of August 28.<sup>41</sup> Following long-standing practice, the court of appeals was not persuaded. Appeal dismissed.

2. *Fatal Failure to Recognize the Significance of the Magic Language.*— There are many orders that may be of critical importance to the parties that are nevertheless not immediately appealable as either final judgments or interlocutory orders appealable as a matter of right under Appellate Rule 14(A).<sup>42</sup> In most instances, such orders can only be appealed using the two-step procedure identified in Appellate Rule 14(B).<sup>43</sup> That is, the party seeking to appeal must first get certification by the trial court in accordance with Appellate Rule 14(B)(1) and then must obtain permission from the court of appeals in accordance with Appellate Rule 14(B)(2).<sup>44</sup>

However, judgment orders entered pursuant to Trial Rules 54 (judgments) or 56 (summary judgments) as to less than all the issues or all the parties can be made immediately appealable without obtaining the permission of the court of appeals if the trial court uses the “magic language.”<sup>45</sup> Trial Rules 54(B) and 56(C) contain similar provisions. Both provide that when the trial court expressly directs “entry of judgment” in writing and determines there is no “just reason for delay,” the judgment is immediately appealable even though it is rendered on less than all the issues, claims, or parties.<sup>46</sup> Appellate Rule 2(H)(2) further implements these particular rules by defining “final judgment” to include partial judgments under Trial Rules 54(B) or 56(C) that include the language directing the entry of judgment and finding no just reason for delay.<sup>47</sup>

In *Peals v. County of Vigo*, the trial court entered a partial summary judgment as to the claims against only one of the three defendants.<sup>48</sup> However, the order stated, “The Court finds that there is no just reason for delay, and expressly directs entry of judgment as to all claims filed by plaintiff against the Board of Commissioners of Vigo County, only.”<sup>49</sup> Six months later, after the claims against the other defendants were voluntarily dismissed, plaintiff sought to appeal the previously-entered partial summary judgment order and filed a notice of

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40. *Id.*

41. *Id.*

42. IND. APP. R. 14(A).

43. IND. APP. R. 14(B).

44. *Id.*

45. In *Ramco Industries, Inc. v. C & E Corp.*, 773 N.E.2d 284 (Ind. Ct. App. 2002), Judge Paul D. Mathias referred to the particular words by which an otherwise partial judgment can be made an appealable final judgment as the “magic language.” *Id.* at 288. The phrase provides a useful shorthand.

46. IND. TRIAL R. 54(B), 56(C).

47. IND. APP. R. 2(H)(2).

48. 783 N.E.2d 781, 782-83 (Ind. Ct. App. 2003).

49. *Id.* at 783.



appeal for that purpose.<sup>50</sup>

The court of appeals noted the presence of the magic language in the partial summary judgment order entered months earlier that made it an immediately appealable final judgment.<sup>51</sup> The court further noted the requirement of Appellate Rule 9(A) that a notice of appeal be filed within thirty days of the entry of a final judgment or the right to appeal is forfeited.<sup>52</sup> The appellant's failure to recognize the significance of the language converting the otherwise interlocutory order into a final judgment was fatal. Appeal dismissed.

*Peals* illustrates a good practice pointer. The party successfully moving for partial summary judgment should strongly consider asking the trial court to include the magic language of finality in its granting order. If the trial court expressly directs "entry of judgment" in writing and determines there is no "just reason for delay," the non-moving party must file a notice of appeal within thirty days or the right to appeal the order would generally be considered lost.

3. *The Court of Appeals Must Approve Any Appeal of a Denial of Summary Judgment.*—Another appeal decided during the reporting period indirectly implicated Trial Rules 54(B) and 56(C) and is significantly informed by the preceding discussion. In *Anonymous Doctor A v. Sherrard*,<sup>53</sup> the trial court denied a motion for summary judgment on a statute of limitations defense.<sup>54</sup> The trial court stated its intent that the order be immediately appealable pursuant to Trial Rules 56(C) and 54(B) and also certified the order for interlocutory appeal in accordance with Appellate Rule 14.<sup>55</sup> The physician-defendant filed a notice of appeal and briefing went forward on the merits.

The court of appeals raised a jurisdictional issue *sua sponte*. First, the court noted (as discussed at some length in the preceding section) that Trial Rules 54(B) and 56(C) generally allow an otherwise interlocutory order entered under one of those rules to be made immediately appealable if the trial court expressly finds in writing that there is no just reason for delay and directs the entry of judgment as to less than all the issues, claims, or parties.<sup>56</sup> However, as the court noted, the *denial* of summary judgment is not any kind of entry of judgment.<sup>57</sup> To be immediately made appealable under Trial Rules 54(B) or 56(C), an order must dispose of at least one substantive claim.<sup>58</sup> Since an order denying summary judgment disposes of nothing, it cannot be made immediately appealable using the magic language of Trial Rule 56(C).

The court further noted that although the trial court had alternatively certified its order for interlocutory appeal pursuant to Appellate Rule 14(B)(1), the

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50. *Id.*

51. *Id.*

52. *Id.*

53. 783 N.E.2d 296 (Ind. Ct. App. 2003).

54. *Id.* at 297.

55. *Id.* at 298.

56. *Id.* at 299.

57. *Id.*

58. *Id.*

appellant had not sought permission from the court of appeals to bring an interlocutory appeal in accordance with Appellate Rule 14(B)(2).<sup>59</sup> Appeal dismissed.

As *Sherrard* illustrates, the denial of summary judgment is always interlocutory and can only be appealed by following the procedures for discretionary interlocutory appeals in Appellate Rule 14(B).

4. *Denial of Summary Judgment, Again.*—The same issue also arose in *Bueter v. Brinkman*.<sup>60</sup> Coincidentally, *Bueter* was also a medical malpractice case. As in *Sherrard*, the defendant physician filed a motion for summary judgment based on a statute of limitations defense that was denied.<sup>61</sup> The trial court certified the order for interlocutory appeal, but the court of appeals refused to accept the appeal, which was within its discretion.<sup>62</sup> The parties nevertheless proceeded forward with briefing as if the trial court's order was a final judgment. The court of appeals explained the jurisdictional defect, referring to the same general principles applied in *Sherrard*.<sup>63</sup> The court further noted that Appellate Rule 66 gives it the authority to accept jurisdiction over the appeal, despite the facts that: (1) the order from which appeal was sought was not a final judgment, and (2) the court had earlier declined to accept jurisdiction over the interlocutory appeal.<sup>64</sup> However, the court elected not to exercise that authority. Appeal dismissed.

5. *Late Notice of Appeal Following a Remand in a Criminal Appeal.*—One of the appeals dismissed by the court of appeals—*Hancock v. State*<sup>65</sup>—raises an interesting, if obscure, question about criminal appellate procedure. The question is so oblique that some background explanation is necessary to even frame it properly. The background analysis begins with developing an understanding of the procedural differences between a direct criminal appeal and a post-conviction appeal.

Appellate Rule 9(A) establishes a firm jurisdictional rule regarding appeals: "Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by P.C.R. 2."<sup>66</sup> In other words, unless Post-Conviction Rule 2 applies, a late notice of appeal is fatal to all appeals. Post-Conviction Rule 2 establishes procedures wherein a person convicted of a crime can petition for leave to bring a late appeal, even when the person has failed to file a timely notice of appeal.<sup>67</sup>

Given the otherwise strict forfeiture provision of Appellate Rule 9, this is a powerful exception. By its own terms, Post-Conviction Rule 2 does not apply to

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59. *Id.*

60. 776 N.E.2d 910 (Ind. Ct. App. 2002).

61. *Id.* at 912.

62. *See* IND. APP. R. 14(B)(2).

63. 776 N.E.2d at 912-13.

64. *Id.* at 912.

65. 786 N.E.2d 1142 (Ind. Ct. App. 2003).

66. IND. APP. R. 9(A).

67. *See* IND. POST-CONVICTION R. 2, § 1.



civil appeals. Further, in *Howard v. State*<sup>68</sup> the Indiana Supreme Court held that the exceptions to the forfeiture rule found in Post-Conviction Rule 2 apply only to criminal direct appeals and not to all criminal appeals.<sup>69</sup> Therefore, the failure to timely file a notice of appeal from collateral criminal proceedings is fatal, and the appeal cannot be saved by the exception allowed by Post-Conviction Rule 2. Examples of such collateral proceedings would include the denial of a post-conviction relief petition,<sup>70</sup> the denial of a motion to correct erroneous sentence,<sup>71</sup> or the denial of a petition seeking habeas corpus relief.<sup>72</sup>

With that background, *Hancock* presents itself in greater focus. In an earlier proceeding, Joseph Hancock appealed his convictions and sentencing on charges of rape and criminal deviate conduct.<sup>73</sup> The court of appeals affirmed in whole, but the supreme court granted transfer of jurisdiction and affirmed in part and reversed in part. The case was remanded to the trial court for re-sentencing consistent with the opinion.<sup>74</sup>

After the trial court re-sentenced Hancock, he sought to appeal the new sentencing judgment. However, his notice of appeal was late and the court of appeals dismissed the appeal, issuing the opinion of interest to this discussion.<sup>75</sup>

Initially, the opinion indicated the appeal was dismissed solely because the appellant did not avail himself of the procedures for bringing a belated appeal under Post-Conviction Rule 2, as discussed above: "Hancock does not claim, nor does the record indicate that he filed a petition for permission to file a belated Notice of Appeal pursuant to Post-Conviction Rule 2. We therefore dismiss Hancock's attempted appeal as untimely."<sup>76</sup> This part of the opinion seems to indicate that Hancock could go back to the trial court and file a P.C.R. 2 § 1 petition, obtain leave to file a belated notice of appeal, file it, and then proceed with appellate review of his new sentence.

However, the court did not stop at that point. The court of appeals continued in the opinion as follows:

See *Davis v. State*, 771 N.E.2d 647, 648-49 (Ind. 2002) (where defendant filed Notice of Appeal after the thirty-day deadline of App. Rule 9, and P-C. R. 2 did not apply, he forfeited his right to appeal, and Court of

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68. 653 N.E.2d 1389 (Ind. 1995).

69. *Id.* at 1390.

70. *Id.*

71. *Davis v. State*, 771 N.E.2d 647, 649 (Ind. 2002).

72. *Montgomery v. State*, Cause No. 45A03-0209-PC-319 (Order, Ind. Ct. App., Sept. 30, 2002) (appeal from the denial of a petition seeking habeas corpus relief dismissed due to untimely notice of appeal).

73. *Hancock v. State*, 768 N.E.2d 880 (Ind. 2002), *modifying and summarily aff'g in part*, 758 N.E.2d 995 (Ind. Ct. App. 2001), *trans. granted*.

74. *Id.*

75. *Id.*

76. *Id.* at 1143-44.

Appeals lacked subject matter jurisdiction).<sup>77</sup>

This concluding citation muddies the water by perhaps suggesting that Hancock has forfeited his right to appeal, as did the appellant in *Davis*. But *Davis* involved an appeal from the denial of a collateral attack on the underlying judgment, in the form of a motion to correct erroneous sentence.<sup>78</sup> By way of contrast, Hancock was appealing a re-sentencing on remand from his direct appeal. As the preceding discussion attempts to clarify, this distinction is important.

The opinion raises but does not answer a question about the rights of an appellant in a direct criminal appeal who receives appellate relief in the form of a remand for new sentencing. If the appellant then wishes to appeal the new sentence entered on remand, an issue arises as to whether the second appeal is a continuation of the initial direct appeal or is an appeal from a new collateral proceeding. If the former, the failure to file a timely notice of appeal would not be fatal and the appeal would be subject to the saving procedures of Post-Conviction Rule 2. If the latter, then the failure to file a timely notice of appeal would result in forfeiture. The supreme court has not spoken definitively of that question, but the better rule might be to treat the second appeal as just a continuation of the first and not as a collateral form of post-conviction proceeding.<sup>79</sup>

The appellant in *Hancock* did not try to re-docket his appeal using the procedures of Post-Conviction Rule 2, suggesting he may have read the opinion to foreclose that possibility.

### C. Use of an Anders Brief in a State Appeal Approved (Maybe)

What happens if competent appellate counsel appointed to represent an indigent criminal defendant can find no good faith basis for taking an appeal? If the appeal is from the denial of post-conviction relief, Indiana's rules provide procedural guidance. Post-Conviction Rule 1 § 9 expressly permits appointed counsel to withdraw from a proceeding upon counsel's certification that there are no meritorious grounds for relief.<sup>80</sup> But the question becomes much more troubling in a direct appeal from a judgment of conviction or sentence.<sup>81</sup>

The counsel appointed to represent an indigent criminal defendant in a meritless direct appeal is pulled in opposite directions by the attorney's ethical

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77. *Id.* at 1144.

78. *See Davis v. State*, 771 N.E.2d 647 (Ind. 2002).

79. There are many instances in which second appeals have been taken following remand for new sentencing. *See, e.g., Shaw v. State*, 771 N.E.2d 85 (Ind. Ct. App. 2002), following remand in *Shaw v. State*, No. 46A05-0001-CR-472, 756 N.E.2d 1101 (Ind. Ct. App., Sept. 26, 2001); *Ingle v. State*, 766 N.E.2d 392 (Ind. Ct. App. 2002), following remand in *Ingle v. State*, 746 N.E.2d 927 (Ind. 2001). Nothing in these second appeals suggests they should be treated as a collateral or post-conviction proceedings.

80. IND. POST CONVICTION R. 1 § 9.

81. For a discussion of the difference between a criminal direct appeal and the appeal of a collateral criminal proceeding, see the preceding discussion of *Hancock*, *supra* Part II.B.5.



obligations. On one side stand the constitutional right to effective appellate counsel,<sup>82</sup> the constitutional right in Indiana to an appeal,<sup>83</sup> and the general obligation to vigorously advocate on behalf of one's client.<sup>84</sup> On the other stand the duty of candor to the tribunal<sup>85</sup> and the duty to avoid asserting frivolous claims or defenses.<sup>86</sup>

Although approaches vary, the federal courts and many state courts have adopted the use of an "Anders brief" to address the problems inherent in a meritless direct criminal appeal.<sup>87</sup> The term for the procedure is taken from *Anders v. California*,<sup>88</sup> a U.S. Supreme Court case decided in 1967. In that opinion, the high court held that when a conscientious examination of a case reveals no appealable issue that is not frivolous, the appellate lawyer can meet the requirements of substantive due process by advising the appellate court and requesting permission to withdraw from the case.<sup>89</sup> The request to withdraw must be accompanied by a brief referring to anything in the record that might arguably support the appeal and must be served upon the client. The appellate court will then decide if the appeal is wholly frivolous and if so, grant counsel's request to withdraw. If the appellate court finds any colorable issue, then the opportunity for assistance of appellate counsel must be afforded to the appellant.<sup>90</sup>

The Indiana Court of Appeals had previously refused to approve the use of the Anders brief in a direct appeal. In *Smith v. State*, a 1977 opinion, the appellate attorney followed the proper procedural steps stated in *Anders* and asked leave to withdraw.<sup>91</sup> However, the appellate court stated that counsel's reliance on *Anders* was "misplaced."<sup>92</sup> The court addressed the two issues that counsel had suggested might arguably support an appeal, independently reviewed the record, affirmed the underlying judgment, and denied the motion to withdraw.<sup>93</sup>

During this most recent reporting period, however, the court of appeals decided *Packer v. State*, a case in which the defendant sought to appeal judgments

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82. See *Miller v. State*, 702 N.E.2d 1053, 1058-59 (Ind. 1998) and cases cited therein.

83. IND. CONST. art. 7, § 6 (2003).

84. MODEL RULES OF PROF'L CONDUCT, PREAMBLE: A LAWYER'S RESPONSIBILITIES ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); MODEL RULE OF PROF'L CONDUCT R. 1.3, cmt. 1.

85. MODEL RULE OF PROF'L CONDUCT R. 3.3.

86. MODEL RULE OF PROF'L CONDUCT R. 3.1.

87. Martha C. Warner, *Anders in the Fifty States: Some Appellant's Equal Protection Is More Equal Than Others*, 23 FLA. ST. U. L. REV. 625, 653 (1996).

88. 386 U.S. 738 (1967).

89. *Id.* at 744.

90. *Id.*

91. 363 N.E.2d 1295, 1296-97 (Ind. Ct. App. 1977).

92. *Id.* at 1297 n.1; see also *Hendrixson v. State*, 316 N.E.2d 451 (Ind. Ct. App. 1974) (refusing to apply *Anders* procedures); *Dixon v. State*, 284 N.E.2d 102 (Ind. Ct. App. 1972).

93. *Smith*, 363 N.E.2d at 1297.

finding her in contempt of court and revoking her probation.<sup>94</sup> Packer's appointed public defender filed a brief stating that "appellate counsel . . . is unable to construct a non-frivolous argument" that the trial court committed any error in its judgments.<sup>95</sup> The argument sections of the brief essentially demonstrated that the trial court did not commit any error. Acting *sua sponte*, the court of appeals expressed its concern that "counsel has neither acted with dedication to the interests of Packer nor advocated with zeal on Packer's behalf."<sup>96</sup>

The court of appeals noted the ethical dilemma and, after balancing the competing considerations, approved the use of the *Anders* procedures in the Indiana state court system.<sup>97</sup>

The *Packer* opinion did not mention the earlier opinions that had declined to authorize the use of *Anders* briefs in Indiana nor the implications of Indiana's constitution that, unlike its federal counterpart, provides for an "absolute right to appeal."<sup>98</sup> However, these omissions from *Packer* are not particularly troubling. The procedures in *Anders* and those followed in the older Indiana cases that declined to approve the use of *Anders* briefs are similar in that they both favor some form of judicial review in all criminal direct appeals. Moreover, the continuing vitality of thirty-year-old opinions disapproving the *Anders* procedures might reasonably be questioned. Further, the constitutional right to an appeal cannot be so broad as to incorporate a right to bring a frivolous appeal.

Transfer of jurisdiction to the Indiana Supreme Court was not sought in *Packer*, so we do not know whether the *Anders* procedure endorsed by this panel of the court of appeals is the final word on this subject. But for the foreseeable future, *Packer* provides current law applicable in those situations in which appointed appellate counsel in a criminal appeal can find no issue to raise that is not frivolous.

#### *D. Trial Court Failure to Create Transcript Discussed in Two Cases*

In *Graddick v. Graddick*,<sup>99</sup> the court of appeals addressed the procedural implications of a court reporter failing to make a transcript of the evidence presented at a trial or hearing.

*Graddick* involved an appeal from a custody determination in a dissolution proceeding. The trial court did not make a record of the evidentiary hearing and the appellant asserted on appeal, among other arguments, that the judgment should be reversed for that reason.<sup>100</sup> The court of appeals declined to do so, citing the general rule that the appellant bears the burden of presenting a record

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94. 777 N.E.2d 733, 735 (Ind. Ct. App. 2002).

95. *Id.* at 736.

96. *Id.* at 737.

97. *Id.*

98. IND. CONST. art. 7, § 6 (2003).

99. 779 N.E.2d 1209, 1210-11 (Ind. Ct. App. 2002).

100. *Id.*



that is complete with respect to the issues raised on appeal. The judgment of the trial court was affirmed.<sup>101</sup>

The court of appeals noted that Appellate Rule 31 explains the procedure for assembling a record when no transcript is available, and stated further that compliance with that rule sustains the appellant's burden of presenting a complete record.<sup>102</sup> In general, Appellate Rule 31 provides that when no or only part of a transcript is available, a verified statement of the evidence may be prepared from the "best available sources" for approval by the trial court.<sup>103</sup> Although the appellant complained that her trial counsel could not recollect the hearing, the appellate court held that the appellant herself could have availed herself of the Appellate Rule 31 procedures based on her own recollection.<sup>104</sup> Although not pointed out by the court of appeals, Appellate Rule 33 also provides a procedural mechanism for creating a record when the parties can agree the issues are capable of resolution without reference to a transcript.<sup>105</sup>

Although the court of appeals refused to find reversible error in the trial court's failure to make a record, the appellate court nevertheless chastised the trial court for conducting a proceeding without recording it. Calling the failure to do so a "folly," the court of appeals stressed the need to record all proceedings or to obtain consent from the parties to waive recording.<sup>106</sup>

In an unrelated case, the court of appeals voiced its concern about unrecorded proceedings in even stronger terms. After noting the inability of the trial court to produce tapes of portions of the trial transcript, the appellate court in *Smith v. State* noted, "Although the missing transcripts played no role in the outcome of this case, we cannot tolerate any failure, however small, to perform such a fundamental element of the judicial process, as such failure tarnishes public confidence in the process and, ultimately, in the judiciary itself."<sup>107</sup>

#### *E. Procedural Pitfalls in Summary Judgment Cases Involving Agency-Principal Relationships Among the Defendants*

*Kreighbaum v. First National Bank & Trust* serves as a reminder to plaintiffs of the care that must be taken to preserve appellate rights when, for example, summary judgment is entered as to less than all the defendants but the liability of the defendants is predicated on agency principles.<sup>108</sup>

The plaintiff in *Kreighbaum* sued a bank, the seller of real estate purchased by the plaintiff, and five agents and loan officers of the bank.<sup>109</sup> The real estate

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101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. IND. APP. R. 31.

106. IND. APP. R. 33.

107. 792 N.E.2d 940, 946 n.4 (Ind. Ct. App. 2003).

108. 776 N.E.2d 413 (Ind. Ct. App. 2002).

109. *Id.* at 416.

seller and one of the bank's agents declared bankruptcy and the proceeding was stayed as to those defendants.<sup>110</sup> The trial court granted summary judgment to the bank and one of its loan officers. The remaining three agents and officers of the bank did not join in the motions for summary judgment, but it was undisputed that their liability was predicated on the bank's liability through agency-principal doctrines.<sup>111</sup> The plaintiff did not file a notice of appeal within thirty days from the entry of the summary judgment order.<sup>112</sup> The trial court proceedings then become muddled,<sup>113</sup> but the matter ended up in the court of appeals.

A judgment order that disposes of all claims as to all parties is a final judgment, and a notice of appeal must be filed within thirty days after entry of the judgment in order to preserve the right to appeal.<sup>114</sup> The two entities that had been granted summary judgment argued on appeal that the trial court's entry of summary judgment was a final judgment and that the appeal should be dismissed because the plaintiff did not file a timely notice of appeal. The plaintiff replied that the judgment was not final because it did not dispose of the claims of the three remaining defendants.

In arguing for dismissal, the appellees asserted that for all practical purposes, the order did dispose of all claims as to all parties because the liability of the three remaining defendants was predicated solely on the bank's liability. Since the bank was granted summary judgment, argued the appellees, that judgment should be considered final as to the non-moving defendants as well.<sup>115</sup>

The court of appeals agreed that had each of the defendants in the case filed motions for summary judgment, "the trial court would have been required to grant them."<sup>116</sup> However, because the other defendants did not file their own motions for summary judgment and the trial court did not expressly enter judgment on their behalf as it could have pursuant to Trial Rule 56(B), the summary judgment order was not, standing alone, an appealable final judgment.<sup>117</sup>

Although the plaintiff-appellant in *Kreighbaum* survived to appeal the summary judgment order on the merits, the opinion should be read as a cautionary tale for cases involving "partial" summary judgment orders in favor of a principal where the liability of the all the other defendants is predicated on their agency with the principal. There are alternative ways in which such an order could be made clearly final and appealable, even when not every defendant moved for summary judgment. For example, Trial Rule 56(B) permits the trial court to grant judgment in favor of other parties even where they did not move

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110. *Id.*

111. *Id.* at 417-18.

112. *Id.* at 416.

113. *Id.* at 418 n.3.

114. See IND. APP. R. 2(H)(1), 9(A).

115. *Kreighbaum*, 776 N.E.2d at 417.

116. *Id.* at 418.

117. *Id.*



for summary judgment.<sup>118</sup> A trial court might well take advantage of that authority and grant judgment to non-moving agency defendants at the same time it grants summary judgment to the principal. Further, the trial court's order could contain the language of finality of Trial Rules 54(B) or 56(C).<sup>119</sup> In any of the examples given, the summary judgment order would be considered a final judgment for purposes of establishing (or losing) appeal rights.

As a final advisory note on this topic, the next panel of the court of appeals faced with a similar situation may not be as forgiving as the *Kreighbaum* panel. In the next procedurally similar appeal, the assigned panel may well conclude that a summary judgment order as to the principal is a final judgment if the only defendants remaining in the case are agents whose liability is solely based on that of the principal. That panel might simply disagree with *Kreighbaum* or find it distinguishable based on the "confusion in the trial court" and "baffl[ing]" procedural orders issued after the summary judgment order was entered in the *Kreighbaum* case.<sup>120</sup>

The thorough appellate lawyer takes special care when dealing with judgment orders of any kind to make sure that all the possible implications for appeal purposes are fully understood. Care is especially warranted when agency-principal relationships exist among the defendants.

#### *F. Order Directing Consummation of Settlement Agreement Generally Not a Final Judgment*

*Georgos v. Jackson*<sup>121</sup> was a tort case in which the trial court ordered mediation. A mediation conference took place in which the plaintiff, Jackson, appeared by counsel but not in person.<sup>122</sup> A settlement agreement was reached at the conference and was signed by counsel. However, Jackson later attempted to repudiate the agreement.<sup>123</sup>

The defendant filed a motion seeking enforcement of the settlement agreement, which the trial court granted. After no activity for five months, Jackson filed a motion for relief from the trial court's order on various grounds.<sup>124</sup> The trial court granted the motion, the case went to trial, and the jury ultimately awarded Jackson a verdict in an amount over five times greater than the settlement agreement would have provided.<sup>125</sup> Defendants appealed.

One of the defendant's claims was that the order granting the motion seeking enforcement of the settlement agreement was a final judgment.<sup>126</sup> Since Jackson

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118. IND TRIAL R. 56(B).

119. See *supra* notes 44-51 in Part II.B.2.

120. 776 N.E.2d at 417 n.2 & 418 n.3.

121. 790 N.E.2d 448 (Ind. 2003).

122. *Id.* at 450.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 451.

did not file a notice of appeal within thirty days of the judgment, argued the defendants, the judgment became the law of the case and the trial court lacked jurisdiction to overrule it.<sup>127</sup>

The court of appeals accepted this contention. It reversed the jury verdict and reinstated the settlement agreement on the ground that the order granting relief from the earlier order to enforce the settlement agreement was void.<sup>128</sup>

The supreme court granted transfer of jurisdiction, thus vacating the opinion of the court of appeals.<sup>129</sup> The high court also reversed the jury verdict and reinstated the settlement agreement, but on a different ground from that advanced by the court of appeals. The supreme court determined that the trial court's order overruling its earlier granting of the motion to enforce the settlement agreement was not void, but was simply erroneous.<sup>130</sup>

In so doing, the court necessarily determined that the order granting the motion to enforce the settlement agreement was itself not a final judgment. The court determined that it was not a final judgment because it did not dispose of all the issues as to all the parties.<sup>131</sup> The court noted that the trial court's order directed Jackson to "take all measures necessary to consummate the settlement . . . within 30 days."<sup>132</sup> The court noted, "This did not dismiss the case, and left open what would happen if, as in fact turned out to be the case, Jackson did not comply with the directive to consummate the agreement."<sup>133</sup>

It might be unwise to read more into *Georgos* than is actually there. Although the supreme court concluded that this particular order to enforce a settlement agreement was not a final appealable judgment, it relied, at least in part, on the specific language of the order. A different order to enforce a settlement agreement, entered under different circumstances and with different language, might well dispose of all the claims as to all the parties and thus be a final judgment for appeal purposes.

### *G. An Order Worth Tracking—Stay Tuned*

For the appellate practitioner, one of the more significant developments of the reporting period may turn out to be a two-word order issued by the Indiana Supreme Court on August 14, 2003: "transfer granted."<sup>134</sup> The order vacated the

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127. See IND. APP. R. 9(A) (providing that failure to file a notice of appeal within thirty days of a final judgment forfeits the right to an appeal).

128. *Georgos v. Jackson*, 762 N.E.2d 202, 207 (Ind. Ct. App. 2002), *vacated*.

129. See *Georgos v. Jackson*, 790 N.E.2d 448 (Ind. 2001).

130. The court concluded that attorney attendance at a mediation conference under the Rules for Alternative Dispute Resolution and execution of a settlement agreement is sufficient to bind the client who fails to attend the conference without excuse. *Id.* at 455.

131. *Id.* at 451.

132. *Id.* at 452.

133. *Id.*

134. *Bojrab v. Bojrab*, Cause No. 02S03-0308-CV-365 (Order, Ind.).



opinion of the court of appeals issued in *Bojrab v. Bojrab*.<sup>135</sup>

A key appellate procedural issue in the case is whether the failure to bring an appeal from an interlocutory order appealable as a matter of right waives the right to appeal the order later after final judgment has been entered.

In *Bojrab*, the trial court entered a preliminary order directing the husband in a dissolution proceeding to, among other things, pay temporary maintenance to the wife.<sup>136</sup> The husband did not immediately appeal. Later, after a final dissolution decree was entered, wife commenced an appeal. On cross-appeal, the husband challenged the maintenance order.

Because the interlocutory order was "for the payment of money," it was immediately appealable as a matter of right pursuant to Appellate Rule 14(A)(1).<sup>137</sup> However, as noted, the husband did not immediately appeal the order, but sought appellate review later after the entry of the final dissolution decree.

Because his appeal rights arose when the interlocutory order for maintenance was issued, the court of appeals held that husband had waived the right to appeal the order by not exercising that right.<sup>138</sup> It therefore declined to address the husband's claim of error.<sup>139</sup> While there is support for that proposition in other opinions of the court of appeals, there is also some supreme court authority that suggests the contrary.<sup>140</sup>

By granting transfer in *Bojrab*, the supreme court has the opportunity to give a final and definitive answer to the question of waiver in interlocutory orders that qualify as appealable of right pursuant to Appellate Rule 14(A). The outcome may be foreshadowed by another opinion of the supreme court issued during the reporting period, *Georgos v. Jackson*, discussed in greater detail above.<sup>141</sup> In *Georgos*, the court addressed whether an order directing the parties to consummate a settlement agreement, without more, is a final judgment for appeal purposes. In concluding that it is not, the court also stated the following in dicta:

Even though the trial court's [ruling compelling the enforcement of a settlement agreement] was an interlocutory order, it was arguably appealable as a matter of right under Appellate Rule 14(A)(2) because it required the execution of a document. However, there is no requirement

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135. 786 N.E.2d 713 (Ind. Ct. App. 2003), *vacated*.

136. *Id.* at 720.

137. *Id.* at 721.

138. *Id.*

139. *Id.*

140. Compare *Crowley v. Crowley*, 708 N.E.2d 42 (Ind. Ct. App. 1999), and *Burbach v. Burbach*, 651 N.E.2d 1158 (Ind. Ct. App. 1995) (holding the right to take appeal of interlocutory available as a matter of right waived if not immediately exercised), with *Trojnar v. Trojnar*, 698 N.E.2d 301 (Ind. 1998), and *Wayne Township v. Parkview Mem'l Hosp.*, 580 N.E.2d 958 (Ind. 1991) (recognizing no waiver of appeal rights in failing to immediately appeal interlocutory order to pay money).

141. 790 N.E.2d 448 (Ind. 2003). See *supra* notes 128-33 accompanying Part II.F.

that an interlocutory appeal be taken, and Jackson may elect to wait until the end of the litigation to raise the issue on appeal from a final judgment.<sup>142</sup>

The opinion of the supreme court in *Bojrab* will be issued some time after this Article will have been submitted for publication.

### III. MISCELLANEOUS DEVELOPMENTS

#### A. Data from the Indiana Supreme Court

As the rule amendments and opinions cited herein demonstrate, the Indiana Supreme Court was again this year a major player in the area of appellate procedure.

The court also accepted a certified question from the United States Court of Appeals for the Third Circuit, the first time the court has been asked to accept a question from a federal appeals court other than the Seventh Circuit.<sup>143</sup>

The court conducted fifty-eight oral arguments during its fiscal year ending June 30, 2003, while disposing of 1097 cases that required a vote from each of the justices. One-hundred-ninety-eight of those dispositions were by majority opinion.<sup>144</sup>

The court's commitment to developing the civil law in Indiana is demonstrated by comparing the number of civil and criminal transfer petitions disposed of and the number of opinions issued. During fiscal 2003, the court disposed of 498 petitions seeking transfer of jurisdiction in criminal cases and 327 petitions in civil cases.<sup>145</sup> However, during that same reporting period, the court issued thirty-two opinions in criminal transfer cases and fifty-two opinions in civil transfer cases.<sup>146</sup> The disposition and opinion numbers do not correlate exactly; some of the opinions issued were accepted in a prior fiscal year and opinions will not be issued in some of the accepted cases until a future fiscal period. However, these numbers suggest that the court granted transfer of jurisdiction in roughly six percent of the criminal cases, compared with sixteen percent of the civil cases presented to it.

#### B. Data from the Indiana Court of Appeals

During calendar 2003, the Indiana Court of Appeals received more appeal filings than at any other time in Indiana history.<sup>147</sup> The state's intermediate

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142. *Georgos*, 790 N.E.2d at 452.

143. *See* *Simon v. United States*, 794 N.E.2d 1087 (Ind. 2003).

144. *See* INDIANA SUPREME COURT ANNUAL REPORT JULY 1, 2002 – JUNE 30, 2003, at 30 and other figures available at the Division of Supreme Court Administration, 313 Statehouse, 200 W. Washington St., Indianapolis, Indiana (2003).

145. *Id.* at 30.

146. *Id.* at 31.

147. Abigail Johnson, *Appeals Court Sees a Record Caseload*, IND. LAW. 1 (Vol. 14, No. 03,



appellate court nevertheless continued its remarkable record of efficiency. The court disposed of 2242 cases during that time period.<sup>148</sup> Once fully briefed, the average age of a case in the chambers of a judge was only 1.2 months.<sup>149</sup>

The court reversed the judgment of the trial court in about 36% of the civil appeals and in about 14% of the criminal appeals.<sup>150</sup> Around 29% of the opinions of the court were published.<sup>151</sup>

The court of appeals hears oral arguments in only about less than 3% of its cases,<sup>152</sup> so an order setting a case for argument from that court suggests the judges on the assigned panel have some questions on their minds.

Of the 2468 motions seeking various extensions of time, the court of appeals denied only 22.<sup>153</sup>

The court of appeals received 290 motions asking for acceptance of a discretionary interlocutory appeal and it granted 119 of those motions.<sup>154</sup>

### *C. And Still Counting . . .*

One day during the reporting period, a delivery person from the State Public Defender agency arrived in the clerk's office with one of the many blue briefs filed each year by that agency. Without fanfare, the brief was filed-marked and the messenger returned to other appointed duties. However, that brief represented a significant milestone—it was the 3000th appellant's brief filed in which Susan K. Carpenter was listed as one of the counsel for the appellant.<sup>155</sup>

On October 12, 1981, Susan Carpenter was first appointed by then Chief Justice Richard Givan to serve as the State Public Defender in Indiana. She had been out of law school for only five years. Ms. Carpenter has been reappointed to that position every four years thereafter.<sup>156</sup> For over twenty-two years, she has directed the agency responsible for representing indigent persons incarcerated in Indiana, primarily in post-conviction proceedings and appeals therefrom.<sup>157</sup> Though there may have been attorneys general who have filed more briefs as the appellee, it would seem beyond question that Ms. Carpenter has represented more appellants than any attorney in Indiana history. Her record number of filings grows further out of reach to future lawyers each week.

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Dec. 31, 2003 – January 13, 2004).

148. See INDIANA COURT OF APPEALS, 2003 ANNUAL REPORT 1 (2004).

149. *Id.*

150. *Id.*

151. *Id.* at 4.

152. *Id.* at 1 (59 oral arguments conducted in connection with 2242 appeals).

153. *Id.* at 12.

154. *Id.*

155. According to records on file with the State Public Defender, One North Capitol, Suite 800, Indianapolis, Indiana.

156. See IND. CODE § 33-1-7-1 (2003).

157. See *id.* § 33-1-7-2.

## CONCLUSION

Finding a theme uniting the rule amendments and opinions issued during the reporting period is difficult. The changes in the appellate rules adopted this past year address fairly minor points of procedure. The published opinions of the period provide helpful guidance, but generally dealt with unusual factual circumstances. However, one of the most serious recurring problems for appellate practitioners was determining whether a judgment order was final and appealable. Many of the opinions discussed in this Article touch on that question.

But if there is a specific message for the appellate lawyer that emerges from this reporting period, it might be that the procedures for taking an appeal in Indiana have advanced to the point where the appellate courts can simply address some of the finer points of procedure, freeing our appellate judges to focus on the difficult substantive issues with which they are daily confronted.



# INDIANA CONSTITUTIONAL DEVELOPMENTS

JON LARAMORE\*

The Indiana Constitution may be conceived as having two parts. First, the structural constitution contains those portions of the document (generally articles III through XV) that describe and regulate the elements of Indiana government.<sup>1</sup> Second, the rights constitution (generally articles I, II and XVI) enumerates the individual rights of Hoosiers.<sup>2</sup> While a few portions of the structural constitution resemble provisions of the federal constitution, there are many differences and a long history of disparate interpretations.<sup>3</sup> Many portions of the rights constitution also parallel federal provisions, and its recent history has been about whether and when the Indiana Constitution would provide rights more expansive than are available under the federal constitution.<sup>4</sup> The tendency has been toward similar interpretations of federal and state rights.<sup>5</sup>

In the most recent year, the Indiana Supreme Court continued its history of interpreting the structural constitution quite boldly, reaffirming principles of standing to vindicate structural constitutional violations, enforcing limitations on special laws, and clarifying the law on tax uniformity.<sup>6</sup> The court also continued its recent history of interpreting provisions of the rights constitution largely the same as parallel federal rights, with a few exceptions.<sup>7</sup> One primary focus of judicial activity relating to the rights constitution was the Equal Privileges and Immunities Clause of article I, section 23, which lacks a direct federal cognate.<sup>8</sup> In several opinions, the Indiana Supreme Court and Indiana Court of Appeals

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1. Article III describes distribution of powers, and articles IV through VII describe the workings of the branches of government. Article VIII sets up Indiana's educational system, and article IX provides for other types of state institutions. Articles X and XIII describe state and local finance; article XI establishes constitutional provisions to regulate corporations; article XII sets up the state militia; article XIV establishes state boundaries; and article XV contains miscellaneous provisions.

2. Article I is Indiana's bill of rights. Article II establishes provisions for voting and elections. Article 16 describes the constitutional amendment process.

3. For example, article IV, section 19 contains a requirement that each bill passed by the legislature contain a single subject matter, a requirement absent from the federal constitution.

4. See, e.g., *State v. Richardson*, 717 N.E.2d 32 (Ind. 1999) (offering more expansive state interpretation of double jeopardy); *Ind. High Sch. Athletic Ass'n v. Carlberg*, 694 N.E.2d 222 (Ind. 1997) ("process due" is identical under state and federal constitutions).

5. Jon Laramore, *Indiana Constitutional Developments: The Wind Shifts*, 36 IND. L. REV. 961, 986-88 (2003).

6. See *infra* Parts I.A-C.

7. See *infra* Parts II.A.3-4, B-D, G.

8. See *infra* Part II.A.

have struggled over the interpretive framework to apply to section 23.<sup>9</sup>

## I. THE STRUCTURAL CONSTITUTION

### A. Standing

The Indiana Supreme Court revisited an important standing doctrine, affirming that judicial doors are open to address public officials' misconduct in *State ex rel. Cittadine v. Indiana Department of Transportation*.<sup>10</sup> Cittadine sued the Department of Transportation to enforce Indiana's Clear View Statute, which required that railroad grade crossings be maintained in a manner permitting an unobstructed view of the railroad right-of-way for 1500 feet in each direction, subject to certain limitations.<sup>11</sup>

The court of appeals had directed dismissal for lack of standing, invoking Indiana's general rule that, to have standing, a plaintiff must have more than a general interest in the litigation common to all members of the public.<sup>12</sup> In Indiana, standing has a constitutional dimension.<sup>13</sup> The Indiana Constitution lacks a case or controversy requirement akin to that in the federal constitution,<sup>14</sup> but the Indiana Supreme Court has said that it applies standing as a prudential doctrine to implement separation of powers principles.<sup>15</sup> Standing doctrine precludes courts from becoming involved in abstract controversies or offering opinions when no one is in danger of harm; to apply standing doctrine otherwise would insert the courts too far into the provinces of the other branches.<sup>16</sup>

*Cittadine* reaffirmed the public standing doctrine's viability as an exception to the general rule that, to have standing, a plaintiff must have some interest greater than that of any other member of the public.<sup>17</sup> In an opinion written by Justice Dickson, the court reviewed the lengthy history of the public standing doctrine, which states that "when a case involves enforcement of a public rather than a private right the plaintiff need not have a special interest in the matter nor be a public official."<sup>18</sup> The doctrine eliminates the requirement that a plaintiff have an interest different than any other member of the general public to have

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9. See *infra* Part II.A.

10. 790 N.E.2d 978 (Ind. 2003).

11. *Id.* at 979 (citing IND. CODE § 8-6-7.6-1 (2001)).

12. *Id.* at 979. The court of appeals' opinion is reported at 750 N.E.2d 893 (Ind. Ct. App. 2001).

13. *Cittadine*, 790 N.E.2d at 979 (citing *Ind. Dep't of Env'tl. Mgmt. v. Chemical Waste Mgmt., Inc.*, 643 N.E.2d 331 (Ind. 1994)).

14. Cf. IND. CONST. art. VII, with U.S. CONST. art. III, § 2.

15. E.g., *Pence v. State*, 652 N.E.2d 486 (Ind. 1995).

16. *Id.*

17. *Cittadine*, 790 N.E.2d at 980-84.

18. *Id.* at 980 (quoting *Schloss v. City of Indianapolis*, 553 N.E.2d 1204, 1206 n.3 (Ind. 1990)).



standing when the object of the litigation is enforcement of a public duty.<sup>19</sup>

Justice Dickson's historical discussion of the public standing doctrine began with an 1852 case, *Hamilton v. State ex rel. Bates*,<sup>20</sup> and cited dozens of other cases employing the public standing doctrine in Indiana and other states, the most recent Indiana case being *Schloss v. City of Indianapolis*<sup>21</sup> in 1990.<sup>22</sup>

The court ruled that the public standing doctrine was not abolished by *Pence v. State*,<sup>23</sup> a 1995 case frequently cited to support a strict interpretation of standing principles under the Indiana Constitution.<sup>24</sup> In *Pence*, citizens sued to invalidate a law, contending that it violated the single subject matter requirement of article IV, section 19; the statute at issue primarily amended various Indiana statutes to bring them in line with the federal Americans with Disabilities Act, but a provision increasing legislative compensation was tacked on the end.<sup>25</sup> The Indiana Supreme Court refused to hear the challenge, holding that plaintiffs lacked standing because their interest in the litigation was no greater than that of any other citizen.<sup>26</sup> "For a private individual to invoke the exercise of judicial power, such person must ordinarily show that some direct injury has or will immediately be sustained."<sup>27</sup>

*Cittadine* ruled that *Pence* did not restrict the public standing doctrine (although the court did not explain why the public standing doctrine did not support standing in *Pence*).<sup>28</sup> It cited language in *Pence* allowing for exceptions to strict standing rules and stated that the public standing doctrine was one such exception.<sup>29</sup>

Although *Cittadine* affirmed the availability of the public standing doctrine "where public rather than private rights are at issue and in cases which involve the enforcement of a public rather than a private right,"<sup>30</sup> *Cittadine* himself did not fare as well.<sup>31</sup> In the three-year period between the time he filed the lawsuit and the Indiana Supreme Court's decision, the Clear View Statute was amended to allow the Department of Transportation to promulgate rules varying the statutory clear view requirements under certain circumstances.<sup>32</sup> The department had done so, and the court ruled that the department's actions mooted *Cittadine*'s

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19. *Id.*

20. 3 Ind. 452 (1852).

21. 553 N.E.2d 1204 (Ind. 1990).

22. *Cittadine*, 790 N.E.2d at 980-82.

23. 652 N.E.2d 486 (Ind. 1995).

24. *Cittadine*, 790 N.E.2d at 983.

25. *Pence*, 652 N.E.2d at 487.

26. *Id.* at 488.

27. *Id.*

28. *Cittadine*, 790 N.E.2d at 983.

29. *Id.*

30. *Id.*

31. *Id.* at 984.

32. *Id.* (citing IND. CODE § 8-6-7.6-1 as amended by Pub. L. 103-2001, § 1 (2001)).

claim.<sup>33</sup>

*Cittadine*'s reaffirmation of the public standing doctrine may signal a new willingness by the Indiana Supreme Court to address issues under the structural constitution and other potential violations of law by public officials. In his dissent in *Pence*, Justice Dickson wrote that "[t]he majority's decision today erects an enormous, if not a prohibitive, obstacle to citizens seeking access to the courts upon claims that the General Assembly has exceeded the limits of its constitutional powers."<sup>34</sup> *Cittadine* goes a long way toward addressing that obstacle, giving plaintiffs a method to seek relief for claims that public officials are failing to carry out their statutory duties or are violating their constitutional responsibilities. The court was willing to address the public standing doctrine despite the acknowledged mootness of the plaintiff's underlying claim, indicating the court's view of the issue's importance.

### B. Special Laws

Perhaps the Indiana Supreme Court's most noticed constitutional case of the year was *City of South Bend v. Kimsey*,<sup>35</sup> which invalidated an annexation statute as an impermissible "special law." The Indiana Supreme Court had not invalidated a statute under these portions of the Indiana Constitution since 1974,<sup>36</sup> although recent cases plainly laid the analytical groundwork for *Kimsey*.<sup>37</sup>

The lawsuit challenged a provision of Indiana's annexation law permitting a referendum to defeat annexation.<sup>38</sup> The law generally required a vote of sixty-five percent of the residents of an area sought to be annexed to defeat annexation. But the law contained a special provision applying only to St. Joseph County (as described in the statute, a county with population between 200,000 and 300,000), which permitted annexation to be defeated in that county by a vote of only fifty percent of the residents in the area to be annexed.<sup>39</sup> The lawsuit arose when South Bend sought to annex a subdivision and sued to invalidate the special referendum provisions.<sup>40</sup> The city lost in the trial court and the court of appeals.<sup>41</sup> The trial court held that the annexation provision was a general law under article IV, sections 22 and 23, and the court of appeals affirmed.<sup>42</sup>

The supreme court's majority opinion, authored by Justice Boehm, reviewed the reasons for restrictions on special laws, that is, laws that apply in only one or

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33. *Cittadine*, 790 N.E.2d at 984.

34. *Pence*, 652 N.E.2d at 489.

35. 781 N.E.2d 683 (Ind. 2003).

36. *See State Election Bd. v. Behnke*, 307 N.E.2d 56 (Ind. 1974).

37. The recent cases include *State v. Hoovler*, 668 N.E.2d 1229 (Ind. 1996) and *Indiana Gaming Commission v. Moseley*, 643 N.E.2d 296 (Ind. 1994).

38. *Kimsey*, 781 N.E.2d at 684.

39. IND. CODE § 36-4-3-13 (2002).

40. 781 N.E.2d at 685.

41. *Id.*

42. *Id.*



a small number of locations rather than generally to all parts of the State.<sup>43</sup> First, special laws provoke “logrolling” among legislators, in which one legislator votes for a bill applying only to another legislator’s district in return for reciprocal consideration.<sup>44</sup> “Logrolling” is frowned upon because it causes legislators to vote based on parochial, rather than general, interests.<sup>45</sup> Second, the framers of the 1851 Indiana Constitution were concerned that consideration of special laws took up too much legislative time.<sup>46</sup> Before limits on special legislation were enacted in the 1851 Constitution, most bills passed by the General Assembly were special, rather than general, laws.<sup>47</sup>

Indiana’s answer to this problem is contained in article IV, sections 22 and 23. Section 22 prohibits special laws in sixteen categories, including special laws providing for punishment of crimes (that is, criminal laws that apply only in some locations); granting divorces; vacating roads, town plats, streets, alleys, and public squares; summoning and empaneling juries; “[p]roviding for the assessment and collection of taxes for State, county, township, or road purposes”; “[r]egulating county and township business”; and others.<sup>48</sup> Section 23 states: “In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State.”<sup>49</sup> Thus, special laws are prohibited in all the section 22 categories and are limited in other instances only to circumstances where a general law cannot be made applicable.<sup>50</sup>

The court reviewed the historic application of these sections, which included some periods of time in which the court declined to consider whether statutes violated special law prohibitions on the theory that the constitution lacked sufficiently specific standards to be applied by the judicial branch.<sup>51</sup> For more than half a century, however, the courts have applied sections 22 and 23, in a few cases invalidating special laws.<sup>52</sup>

Importantly, for a significant period of time the court determined that statutes that effectively applied only to one locale were general, not special, if the designation of the location was made by population category rather than by

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43. *Id.* at 685-87.

44. *Id.* at 685-86.

45. *Id.*

46. *Id.* at 686-87.

47. *Ind. Gaming Comm’n v. Moseley*, 643 N.E.2d 296, 299 (Ind. 1994) (citing Frank E. Horak & Matthew E. Welsh, *Special Legislation: Another Twilight Zone*, 12 IND. L.J. 109, 115-16 (1936)).

48. IND. CONST. art. IV, § 22.

49. IND. CONST. art. IV, § 23.

50. Jon Laramore, *Dispelling Myths Generated by Kimsey*, RES GESTAE 35, 37-38 (May 2003).

51. *Kimsey*, 781 N.E.2d at 687-89 (citing *Gentile v. State*, 29 Ind. 409 (1868) (claims under special laws provisions present no justiciable claim)).

52. See, e.g., *Groves v. Bd. of Comm’rs*, 199 N.E. 137 (Ind. 1936) (finding justiciable claim under special laws provisions).

name.<sup>53</sup> That is, if a statute applied to any county, city, or town of a certain population, it was considered to be a valid general law even if, in practice, it applied only to one county, city, or town.<sup>54</sup> The theory behind this approach was that other counties, cities, or towns could move into the population category as their populations increased or decreased.<sup>55</sup> Some cases decided during this period also required that there be a reasonable relationship between the object of the legislation and the population classification.<sup>56</sup>

More recent cases rejected this approach in favor of a more literal application of the constitutional provisions.<sup>57</sup> As Justice Boehm wrote for the *Kimsey* majority,

[t]he terms “general law” and “special law” have widely understood meanings. A statute is “general” if it applies “to all persons or places of a specified class throughout the state.” A statute is “special” if it “pertains to and affects a particular case, person, place, or thing, as opposed to the general public.”<sup>58</sup>

Two recent Indiana Supreme Court cases, *Indiana Gaming Commission v. Moseley*<sup>59</sup> and *State v. Hoovler*,<sup>60</sup> made it clear that the courts would examine the actual effect of a statute to determine whether it was general or special. The subterfuge of population classifications would no longer preclude analysis of the

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53. See, e.g., *N. Twp. Advisory Bd. v. Mamala*, 490 N.E.2d 725 (Ind. 1986).

54. *Id.*

55. *Id.* The Indiana Supreme Court, however, apparently understood by the time of *Kimsey* that this distinction existed only in theory, not in practice. The rules for applying population restrictions in statutes state that the population of a county, city, or other political subdivision is determined once every decade by official census figures. IND. CODE § 1-1-3.5-1 to -6 (2001). Thus, a population restriction in a statute determines for a ten-year period what location is designated (for example, in the 1990s South Bend was the only city in Indiana with a population between 200,000 and 300,000). But the General Assembly historically did not permit new locales to enter population categories. Every tenth year, the General Assembly passed a law changing population categories to correspond with new census data so that new locations could not move into the population categories associated with and defining any given special law and the targeted location would remain the only location in the category. See, e.g., P.L. 170-2002. Colloquy in the *Kimsey* oral argument indicated that the supreme court was generally aware of this practice, which undermined the original rationale for holding that a law with population restrictions was “general” rather than “special.” Streaming video of the oral argument may be found at [www.in.gov/judiciary/webcast/archive/oao2002.html](http://www.in.gov/judiciary/webcast/archive/oao2002.html).

56. See, e.g., *Evansville-Vanderburgh Levee Auth. Dist. v. Kamp*, 168 N.E.2d 208 (Ind. 1960).

57. See, e.g., *State v. Hoovler*, 668 N.E.2d 1229 (Ind. 1996); *Ind. Gaming Comm’n v. Moseley*, 643 N.E.2d 296 (Ind. 1994).

58. *City of South Bend v. Kimsey*, 781 N.E.2d 683, 689 (Ind. 2003) (citations omitted).

59. 643 N.E.2d at 296.

60. 668 N.E.2d at 1229.



true impact of a statute.<sup>61</sup> Justice Boehm wrote that the statutes approved in *Moseley* and *Hoovler* “would have been permissible under Article IV if they had identified the affected counties by name,” not by population, and encouraged the General Assembly to use names to identify affected locations in future special legislation to assist in analysis.<sup>62</sup>

In describing *Moseley* and *Hoovler*, the majority noted that the justification for a special law may be independent of the population category.<sup>63</sup> That is, whether a statute was a valid special law did not depend on whether it was somehow appropriate to the population category designating the location where it applied, but rather on how the special law operated in practice.<sup>64</sup> *Hoovler* approved a special tax to address a Superfund liability in Tippecanoe County, and it did so not because Tippecanoe County was of a certain population (although the statute was written to apply only to a county in a certain population category), but rather because the county proved special circumstances justifying its special treatment under a special law.<sup>65</sup> *Moseley* blessed a riverboat gaming statute that permitted special referendum provisions in Lake County not because of the county’s population, but because only in Lake County, and no other county affected by the law, was the entire relevant coastline comprised of incorporated cities and towns.<sup>66</sup> In each of these cases, the General Assembly used a population category to designate the affected locality, but the court approved the statute because of special circumstances justifying the special law in each locality although those circumstances were independent of population.

*Kimsey* invoked only section 23, not section 22, because there was no contention that the law in *Kimsey* implicated any of the categories of special law prohibited by section 22.<sup>67</sup> The Indiana Supreme Court first determined—contrary to the holdings of the trial court and court of appeals—that the use of population categories in the annexation statute did not make the law general.<sup>68</sup> The court analyzed the operation of the statute, determining that it applied only in one county, St. Joseph, and that the circumstances of its enactment indicated that it was intended to apply only to St. Joseph County currently and for the

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61. *Kimsey*, 781 N.E.2d at 690.

62. *Id.* at 691.

63. *Id.* The classification may also relate to the population category. For instance, the “Unigov” legislation unifying the governments of Indianapolis and Marion County relates to population because it is a governmental system designed for the largest counties in the state. Similarly, Indiana courts have upheld special laws creating superior courts in various counties. *E.g.*, *Williams v. State*, 724 N.E.2d 1070, 1084-87 (Ind. 2000). Presumably these statutes, which designate the counties by name, distribute courts in rough accord with need and therefore are related to population.

64. *Kimsey*, 781 N.E.2d at 690-91.

65. 668 N.E.2d at 1233-36.

66. 643 N.E.2d at 298-301.

67. 781 N.E.2d at 685 (raising only section 23 claim).

68. *Id.* at 693.

foreseeable future.<sup>69</sup>

The majority then addressed the validity of the special provision.<sup>70</sup> The court stated that the party challenging the law must negate every conceivable basis that could support the classification, either by presenting evidence or pointing to facts of which the court could take judicial notice showing that the location lacked special characteristics justifying a special law.<sup>71</sup>

Classifications under article IV, section 23 withstand scrutiny only when they are based on inherent characteristics that separate the locations within the classification from those outside it.<sup>72</sup> "In other words, for a special law to be imposed, it must be reasonably related to inherent characteristics of the territory in which it is applied, and apply equally to those [territories that] share those characteristics."<sup>73</sup>

The court addressed the proper analytical approach under section 23 at greater length in *Kimsey* than it had done before.<sup>74</sup> First, "[a] statute general in form 'can be made applicable' only if it does not violate Article I, Section 23 [the Equal Privileges and Immunities Clause]. Thus, if population classifications are arbitrary or unrelated to the characteristics that define the class, a statute general in form is nevertheless unconstitutional as a violation of Article I."<sup>75</sup> The analysis under article IV is not identical to article I analysis, however. Under article IV, "[a] second consideration in whether a general law 'can be made applicable' is whether in fact it is meaningful in a variety of places or whether relevant traits of the affected area are distinctive such that the law's application elsewhere has no effect."<sup>76</sup> To be valid, not only must a special law be related to special characteristics of the location where it applies, but the location where it applies must be the only location possessing those special characteristics.<sup>77</sup>

The majority determined that the proper standard under article IV, section 23 was similar to the analysis mandated under article I, section 23 by *Collins v. Day*.<sup>78</sup> This approach is sensible because both provisions were aimed at precluding unreasonable classifications.<sup>79</sup> Article 1, section 23 is designed to preclude statutes that give privileges or immunities to some, while withholding the same privileges or immunities from others similarly situated. Article 4, section 23 is designed to preclude statutes that give special treatment to certain

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69. *Id.*

70. *Id.* at 694.

71. *Id.*

72. *Id.* at 692-93.

73. *Id.* at 689.

74. *Id.* at 688-89, 692-93.

75. *Id.* at 692.

76. *Id.*

77. *Id.* at 692-93. The court also noted that, historically, special laws containing population categories were upheld based on a reasonableness standard, but the majority rejected that approach as too simple.

78. *Id.* (citing *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994)).

79. *Id.* at 692-93.



locations, while withholding the same treatment to similarly situated locations.<sup>80</sup>

In *Kimsey*, those defending the law offered several justifications for the special treatment of counties in the relevant population category.<sup>81</sup> "But these reasons were all couched in terms of characteristics of St. Joseph County, not necessarily those possessed by a county of this population size."<sup>82</sup> These reasons included the need to preserve rural land around South Bend and the need to keep South Bend and neighboring Mishawaka from competing over annexation.<sup>83</sup> The court concluded, however, that none of these factors was unique to counties with populations between 200,000 and 300,000 or to St. Joseph County itself.<sup>84</sup> The majority concluded: "we are directed to nothing in the record and no relevant facts susceptible of judicial notice that are unique to St. Joseph County. Accordingly, this legislation is unconstitutional special legislation."<sup>85</sup>

Only Justice Sullivan dissented.<sup>86</sup> He argued that the history of judicial review under the special laws sections exhibited great deference to legislative judgment, in contrast to the *Kimsey* majority's approach.<sup>87</sup> He expressed skepticism about invalidating legislative decisions when they do not infringe upon an enumerated individual right, restrict the political process or affect a discrete and insular minority.<sup>88</sup> The legislation at issue in *Kimsey* was the product of a political struggle between suburban and urban interests in which the suburban interests prevailed, Justice Sullivan wrote, and the courts should tread very carefully in this political arena.<sup>89</sup> He criticized the majority for giving little guidance to the legislative branch as to which of the many statutes limited in their applicability by population restrictions remain valid after *Kimsey* and what criteria the General Assembly could use to ensure that its future efforts will pass constitutional muster.<sup>90</sup>

*Kimsey* did not break new analytical ground.<sup>91</sup> It applied the framework set forth in *Moseley* and *Hoovler*, but took a different course than those two cases by invalidating a special law, finding no special circumstances to justify its application in a single location. *Kimsey* is notable not for methodological novelty, but for calling public and legislative attention to the limitations on

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80. Compare *Collins*, 644 N.E.2d at 78-81 (article I, section 23), with *State v. Hoovler*, 668 N.E.2d 1229, 1233-36 (Ind. 1996) (article IV, section 23).

81. 781 N.E.2d at 694.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 697.

87. *Id.* at 698.

88. *Id.*

89. *Id.*

90. *Id.* at 698-99. Justice Sullivan did not himself posit any framework for determining whether a law violated the special law limitations. The majority suggested that Justice Sullivan's position would provide for no judicial review under article IV, sections 22 and 23. *Id.* at 695-96.

91. Laramore, *supra* note 50, at 35.

special laws and enforcing the constitutional limits according to thoroughly articulated principles.

### C. Uniform and Equal Taxation

At the height of public furor over the property reassessment mandated by *Department of Local Government Finance v. Town of St. John*,<sup>92</sup> the Indiana Supreme Court brought additional predictability to the principles governing property taxation—and perhaps foreshadowed approval of various methods of reducing the burden on certain taxpayers.<sup>93</sup> It did so in two cases, *Department of Local Government Finance v. Griffin*<sup>94</sup> and *State Board of Tax Commissioners v. Inland Container Corp.*<sup>95</sup>

*Griffin* challenged the method for calculating the Health Care for the Indigent (HCI) tax, a levy designed to support emergency health care for those unable to pay for it.<sup>96</sup> HCI began as a county program, supported by a property tax levy, under which county governments paid the cost of emergency medical care.<sup>97</sup> In the 1990s, the program was centralized at the state level, relieving counties of the burdens of administering the program and creating a centralized fund to attract federal Medicaid money to augment the property tax levy as a source of payment for indigent health care.<sup>98</sup> When the program became centrally administered, property tax rates for the HCI program were set by a statutory formula based on each county's historic cost of providing indigent health care, increased annually by a statewide growth factor.<sup>99</sup> By the time the lawsuit was filed, the statutory formula dictated seventy-two different tax rates in Indiana's ninety-two counties.<sup>100</sup>

The heart of *Griffin*'s complaint was that HCI had become a State program, so it should be supported by a property tax applied at a uniform rate across the

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92. *State Bd. of Tax Comm'rs v. Town of St. John*, 751 N.E.2d 657 (Ind. 2001) (limited to question of attorneys' fees); *State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034 (Ind. 1998); *Town of St. John v. State Bd. of Tax Comm'rs*, 695 N.E.2d 123 (Ind. 1998); *Boehm v. Town of St. John*, 675 N.E.2d 318 (Ind. 1996); *Town of St. John v. State Bd. of Tax Comm'rs*, 729 N.E.2d 242 (Ind. Tax Ct. 2000); *Town of St. John v. State Bd. of Tax Comm'rs*, 698 N.E.2d 399 (Ind. Tax Ct. 1998); *Town of St. John v. State Bd. of Tax Comm'rs*, 691 N.E.2d 1387 (Ind. Tax Ct. 1998); *Town of St. John v. State Bd. of Tax Comm'rs*, 690 N.E.2d 370 (Ind. Tax Ct. 1997); *Town of St. John v. State Bd. of Tax Comm'rs*, 665 N.E.2d 965 (Ind. Tax Ct. 1996); *Bielski v. Zorn*, 627 N.E.2d 880 (Ind. Tax Ct. 1994).

93. E.g., Mary Beth Schneider, *Hoosiers Call for Tax Bill Relief*, INDIANAPOLIS STAR, July 28, 2003; Steve Walsh, *Tax Bill Sticker Shock Likely*, GARY POST-TRIB., Aug. 7, 2003.

94. 784 N.E.2d 448 (Ind. 2003).

95. 785 N.E.2d 227 (Ind. 2003).

96. 784 N.E.2d at 450-51.

97. *Id.* at 454.

98. *Id.*

99. *Id.* at 451.

100. *Id.* at 455.



State rather than the dozens of rates established by the statutory formula based on historic costs.<sup>101</sup> He argued that the uniform rate was mandated by article X, section 1's requirement that all property in the State be assessed and taxed at a uniform and equal rate.<sup>102</sup> As a resident of Lake County, Griffin paid at a higher rate than most other counties.<sup>103</sup>

In addressing Griffin's claim, the Indiana Supreme Court noted the General Assembly's broad power in the area of taxation, fettered only by the Indiana Constitution.<sup>104</sup> It reiterated the well-known principle of property taxation that "[u]niformity in rate, as required by the Constitution, means that the same rate shall apply alike to all in any given taxing district."<sup>105</sup> The court continued that "as a general proposition, article 10 requires that a tax for a state purpose must be uniform and equal throughout the State, a tax for a county purpose must be uniform and equal throughout the county, and so forth."<sup>106</sup>

The court also stated that the restrictions of article X have largely been aimed at assessments, indicating skepticism about applying the clause to rates.<sup>107</sup> The history of the adoption of article X and many cases applying it have emphasized that the uniformity and equality requirement was meant to ensure that all property was assessed on the same basis, so that everyone's tax bill was calculated from a common foundation.<sup>108</sup> Although the court did not discuss the *Town of St. John* case in *Griffin*, *Town of St. John* illustrated this principle through its requirement that all property be assessed based on objective indicia of value that are subject to measurement to ensure that all property is valued on a comparable basis.<sup>109</sup>

The court next examined the nature of the HCI program, determining that it was neither a wholly State nor wholly county program.<sup>110</sup>

The nature of a tax is determined by its operation and incidence rather than by legislative title or designation. On this basis, the HCI tax cannot be simply classified as a "local" or "state" tax because the facts surrounding the tax and its operation demonstrate that it is part of a combined effort by local, state, and federal governments.<sup>111</sup>

Paying for indigent health care was historically an entirely local responsibility, but management of the program was later taken over by the State in a manner

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101. *Id.* at 450-51.

102. *Id.*

103. *Griffin v. Dep't of Local Gov't Fin.*, 765 N.E.2d 716, 724 (Ind. Tax Ct. 2002).

104. *Griffin*, 784 N.E.2d at 452.

105. *Id.*

106. *Id.* at 452-53.

107. *Id.* at 453-54.

108. *Id.*

109. *State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034, 1040-41 (Ind. 1998).

110. *Griffin*, 784 N.E.2d. at 454-55.

111. *Id.* at 454 (internal citation omitted).

designed to attract additional federal money to the program.<sup>112</sup> Because of the joint nature of the program, the court declined to label it “state” or “local.”<sup>113</sup>

The court then noted that each county’s tax rate was based on that county’s individual historical cost for administering HCI, inflated by a statewide growth factor.<sup>114</sup> This method for setting the HCI tax rate did not differ in concept, the court wrote, from the way in which most other property tax rates are set in Indiana.<sup>115</sup> Each unit of government—county, city, town, township, school district, library district, solid waste district, and a variety of others—has its own tax rate based on its individual costs as expressed in budgets set by publicly accountable officials.<sup>116</sup> Any individual’s tax rate is the sum of the rates set by the county, township, school district, city or town, and other political subdivisions in which that individual lives. In this context, the court wrote, “we are hard pressed to see the constitutional evil in a program involving money from three levels of government that sets the rate of local contribution so that it varies in harmony with expenses for indigent health care in the local area.”<sup>117</sup> Especially because the payment for indigent health care costs was historically a local responsibility, the court approved the statutory formula basing each county’s tax rate on its historical experience.<sup>118</sup>

The court ended its opinion with further explanation that the net result of the HCI system as currently operated is to generate more dollars to pay health care costs without increasing property taxes.<sup>119</sup> Because the HCI program attracts matching federal Medicaid money, localities such as Lake County with historically high HCI costs now must raise far less through their property tax levies than they would have had to raise if the centralized system attracting Medicaid had not been instituted.<sup>120</sup> The court noted that Lake County had historically received far more HCI service than any other county.<sup>121</sup> The court provided figures to show that, even with its high HCI rate, Lake County health care providers still receive more from the program than its taxpayers pay in.<sup>122</sup> Given these facts, the court ruled that the General Assembly acted within its broad discretion in the taxing area in designing the HCI system.<sup>123</sup> Justice Dickson dissented without opinion.<sup>124</sup>

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112. *Id.*

113. *Id.* at 455.

114. *Id.*

115. *Id.* at 455-56.

116. *See generally* IND. CODE § 6-1.1-17, -18 (1998). Rates may be found at [www.in.gov/dlgf/taxrates](http://www.in.gov/dlgf/taxrates).

117. *Griffin*, 784 N.E.2d at 456.

118. *Id.* at 457.

119. *Id.* at 457-59.

120. *Id.*

121. *Id.* at 459.

122. *Id.* at 458 n.14.

123. *Id.* at 459.

124. *Id.*



The court further explained the requirements of article X, section 1 in *Inland Container Corp. v. State Board of Tax Commissioners*,<sup>125</sup> a case addressing legislative authority in the area of property tax credits, deductions, abatements and other “tax policy” tools. Inland Container applied for and was granted a Resource Recovery System property tax deduction for its mill in Vermillion County, which disposed of recycled paper.<sup>126</sup> Before it could take the deduction, however, the General Assembly repealed the deduction for taxpayers such as Inland, which had not yet been able to take advantage of it.<sup>127</sup> For other taxpayers that already had been able to use the deduction, in contrast, the General Assembly phased out the deduction over a period of years.<sup>128</sup> Thus, in some years in which Inland Container was not permitted the deduction, other taxpayers could use the deduction solely because they had applied for it before Inland Container was able to do so.<sup>129</sup>

The tax court invalidated the legislative enactment as violating the uniformity and equality requirements of article X, stating that the legislative classification “allowed some taxpayers with comparable properties to obtain the RRS deduction on a phased out basis for the 1994 to 1997 assessment years, while other taxpayers, such as Inland, were altogether denied the RRS deduction [in the same years].”<sup>130</sup> The State argued that the tax court erred because deductions such as the one at issue in this case are not “property assessment and taxation,” which is the subject of article X, section 1, and therefore deductions do not have to meet the uniformity and equality requirements.<sup>131</sup>

The Indiana Supreme Court approved the legislation.<sup>132</sup> Justice Dickson wrote for a unanimous court that “[m]ost, if not all, legislative changes in tax policy arguably create interim temporal disparities. Article 10 contemplates legislative modifications of tax policies and is not automatically violated whenever tax policies change.”<sup>133</sup> Article 10 is not violated just because one property receives a deduction in a given year and, because of statutory changes, a comparable property does not.<sup>134</sup> “[T]here is no constitutional violation simply because tax policies applicable in one year are different from those applicable in another year, or because tax legislation may employ a transitional or graduated elimination of prior tax policies or implementation of new ones.”<sup>135</sup>

In these decisions, the court provided significant new interpretations of the

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125. 785 N.E.2d 227 (Ind. 2003).

126. *Id.* at 228.

127. *Id.* (citing Pub. L. 25-1995, § 104(b) (amending IND. CODE § 6-1.1-12-28.5 (2003))).

128. *Id.*

129. *Id.*

130. *Inland Container Corp. v. State Bd. of Tax Comm’rs*, 756 N.E.2d 1109, 1119 (Ind. Tax Ct. 2001).

131. *Inland Container*, 785 N.E.2d at 229.

132. *Id.* at 229-30.

133. *Id.* at 229.

134. *Id.* at 229-30.

135. *Id.* at 230.

uniformity and equality requirements of article X, section 1. *Town of St. John* held that article X, section 1 requires a uniform, objectively verifiable basis for property tax assessments.<sup>136</sup> *Griffin* goes further, allowing disparities in tax rates, even for a statewide program. *Griffin* shows substantial deference to the Indiana General Assembly in applying historical and practical considerations in creating a taxing scheme.<sup>137</sup> *Inland Container* is perhaps even more important in the current environment, giving wide berth to legislative judgments about tax policy and declining to apply strict uniformity requirements to tax policy devices such as deductions.<sup>138</sup>

As the Indiana General Assembly addresses the effects of the 2002 reassessment (effective in tax bills received in 2003 and 2004), these decisions give the General Assembly room to employ various devices, including tax credits and deductions, to blunt undesirable effects of reassessment and to achieve other policy objectives.<sup>139</sup>

#### D. Distribution of Powers

It is appropriate to end this discussion of decisions under the structural constitution with *Peterson v. Borst*,<sup>140</sup> a decision not explicitly constitutional in content but that clearly displays the Indiana Supreme Court's view of its role in the constitutional system. The case addressed the redistricting of City-County Council districts in Marion County mandated by the 2000 census.<sup>141</sup> The City-County Council adopted a redistricting plan, voting strictly along party lines.<sup>142</sup> The mayor vetoed the redistricting ordinance, and no override vote was taken.<sup>143</sup>

By statute, when no redistricting ordinance is adopted, any person may "petition the superior court of the county to hear and determine the matter," and the superior court is required to address the matter *en banc*.<sup>144</sup> In this case, the City-County Council President petitioned the superior court to adopt the plan that had been passed by the council's majority; the minority leader of the council joined the litigation and sought appointment of a special master to draw districts.<sup>145</sup> After holding a "trial" *en banc*, the superior court voted—again

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136. *State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034, 1040-41 (Ind. 1998).

137. *Griffin v. Dep't of Local Gov't Fin.*, 784 N.E.2d 448, 452, 456-59 (Ind. 2003).

138. 785 N.E.2d at 229-30.

139. Article 10, section 1, which mandates uniform and equal taxation, is the subject of a proposed constitutional amendment that will be presented to voters in November 2004. The amendment would expand the kinds of property that the legislature could exempt from taxation to include residences and all tangible personal property except that which is held for investment. Pub. L. 278-2003.

140. 786 N.E.2d 668 (Ind. 2003).

141. *Id.* at 669-71.

142. *Id.* at 670.

143. *Id.*

144. *Id.* (quoting IND. CODE § 36-3-4-3 (1998)).

145. *Id.* at 671.



along party lines (superior court judges in Marion County are elected on a partisan ballot)<sup>146</sup>—to adopt the plan that originally had been adopted by the council's majority.<sup>147</sup> The council minority appealed, and the supreme court accepted the case on an expedited basis under its emergency authority.<sup>148</sup>

In a unanimous *per curiam* decision,<sup>149</sup> the court held that the superior court violated its duty of independence and neutrality when it adopted one political party's redistricting map.<sup>150</sup> The court noted that this duty is embodied in Indiana's Code of Judicial Conduct and has been expressed by federal courts in similar situations.<sup>151</sup> "Based on the unchallenged principle of judicial independence and neutrality, we hold that in resolving partisan redistricting disputes, Indiana judges must consider only the factors required by applicable federal and State law."<sup>152</sup> In other words, judges are forbidden from considering the partisan political consequences of redistricting because neither the constitution nor statutes permit them to do so. The court concluded that the superior court's approval of the council majority's plan unavoidably introduced at least the appearance of political considerations into the judicial process, requiring that district boundaries be redrawn.<sup>153</sup>

When a court is assigned to draw up districts, it must do so in a neutral manner, looking only at the districting requirements in the statute (here, compactness subject to natural boundaries; equal populations; and adherence to existing precinct boundaries).<sup>154</sup> The court indicated that in rare circumstances, a reviewing court could adopt a plan submitted by one of the parties to redistricting litigation, but "we remain convinced that when faced with a politically polarized redistricting dispute like the one in this case, a court's

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146. IND. CODE § 33-5.1-2-8 (1998).

147. *Peterson*, 786 N.E.2d at 671.

148. *Id.* See IND. APP. R. 56(A).

149. The court explained that it handled the case in an unusual way because of the need for a speedy decision before the primary election date. Aside from speeding up the entire briefing and argument process,

[o]ur own decision-making has been treated as a matter of urgency, in which we have dispensed with certain customs. Once it became apparent that there was not a majority to affirm the Superior Court's judgment, we have concentrated on fashioning a remedy. As is sometimes the case in appellate courts, today's *per curiam* does not necessarily reflect the initial position of each of the members. In light of the press of time, we have joined in today's decision without taking the time required to iron out or explicate those differences.

*Peterson*, 786 N.E.2d at 671. This statement indicates that the court dispensed with the analysis that would otherwise have been necessary to fully explain its decision, perhaps including separate opinions.

150. *Id.* at 673-74.

151. *Id.* at 672-74 (citing Ind. Jud. Conduct Canons 1(A), 2(A), 2(B), 3(b)(2)).

152. *Id.* at 672.

153. *Id.* at 673, 676.

154. *Id.* at 677 (citing IND. CODE § 36-3-4-3 (1998)).

adoption of a plan that represents one political party's idea of how district boundaries should be drawn does not conform to the principle of judicial independence and neutrality."<sup>155</sup>

The court expressed confidence that the superior court could, on remand, adopt a redistricting plan conforming to neutral principles, but the court found that the time pressure of the upcoming primary precluded remand.<sup>156</sup> The day after hearing argument, therefore, the court required the parties to submit in digital form all of the information used to draw city-county council districts—but with every bit of information indicating the political consequences deleted.<sup>157</sup> With this information, the court itself used a redistricting computer program to draw new city-county council districts.<sup>158</sup> In doing so, the court stated, it gave “primary consideration” to the statutory factors and obviously acted without reference to electoral consequences, since the court had no information on the political affiliations of voters in the new districts.<sup>159</sup> The court attached maps of the new districts to its opinion and posted the maps on its Internet site.<sup>160</sup> The court also extended the statutory deadlines for candidates to indicate which districts they intended to run in, or whether they intended to run at large, so that they could adjust their conduct to the new maps.<sup>161</sup>

In issuing its opinion, the court noted that its decision was not necessarily the end of the dispute.<sup>162</sup> The parties still had time—if the council and the mayor could agree—to adopt a new map before the primary election.<sup>163</sup> If the council and mayor could overcome political differences to agree on a redistricting plan, that plan would supercede the map drawn by the court.<sup>164</sup> The political actors did not attempt this approach, however.

This opinion shows the Indiana Supreme Court's view of itself in the governmental system established by articles III through VII of the Indiana Constitution. First, the court views itself as scrupulously nonpolitical. Although it must make decisions with highly charged political consequences, it strives to do so in a neutral manner in accordance with the nonpolitical judicial role.<sup>165</sup>

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155. *Id.* at 675-76.

156. *Id.* at 676.

157. *Id.* at 676-77. The Court's order stated that the data “shall not include individual or collective information about voting histories, political party affiliations, incumbency information, voting projections, or political data of that nature. This information is not relevant to the court's review.” *Id.* at 677.

158. *Id.*

159. *Id.*

160. *Id.* at 692-94.

161. *Id.* at 679.

162. *Id.* at 678.

163. *Id.*

164. *Id.*

165. *E.g., id.* at 676-78. *D & M Healthcare v. Kernan*, 800 N.E.2d 898 (Ind. 2003), a case decided after the time period covered by this Article, well illustrates this principle. In it, the court concluded that the Governor's method of returning vetoes was valid under article IV, section 14.



Second, the court views itself as supreme within the Judicial Branch. The statute at issue in this case did not explicitly give the supreme court authority to draw legislative districts.<sup>166</sup> But because the matter was committed to the Judicial Branch for resolution, the court believed that it had both the competence and the authority to give the matter plenary consideration.<sup>167</sup> The court opined that it could have remanded the matter to the Marion Superior Court for resolution, but declined to do so because of temporal exigencies and instead constructed the remedy itself from scratch.<sup>168</sup> Third, the court is able to address complex matters on tight deadlines. Here, the case proceeded from notice of appeal on February 14, 2003, through expedited briefing and argument, submission of digital information on districting, to release of an opinion and remedy constructed by use of the latest technology on March 19, 2003—a total time of only forty-seven days.<sup>169</sup>

## II. THE RIGHTS CONSTITUTION

Two provisions of Indiana's Bill of Rights, the Open Courts Clause of article I, section 12 and the Equal Privileges and Immunities Clause of article I, section 23, continue to be sources of dispute, and the law remains unsettled on some important aspects of these provisions. Cases applying these provisions in the most recent year addressed, but did not settle, significant analytical issues.

### A. *Equal Privileges and Immunities Clause*

Article I, section 23 addresses the limits placed upon legislative classifications—asking when the legislature may treat two classes in differing manners. A central question in this analysis, arising first in *McIntosh v. Melroe Co.*<sup>170</sup> and still unanswered in a manner satisfactory to all justices of the Indiana Supreme Court, is how to define the classes being compared in section 23 analysis.

When the Indiana Supreme Court first set the standard for reviewing claims under the Equal Privileges and Immunities Clause, it clarified that the standard differed from federal equal protection analysis.<sup>171</sup> The federal standard has long featured differing levels of scrutiny depending on the kind of classification or rights involved, and the Indiana Supreme Court rejected the idea of levels of scrutiny in section 23 analysis. "The protections assured by section 23 apply fully, equally, and without diminution to prohibit any and all improper grants of unequal privileges or immunities, including not only those grants involving

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It did so even though the effect of its decision was to deny a pay raise to legislators and judges.

166. *Id.* at 676 (council majority leader argued that supreme court lacked authority to draw districts).

167. *Id.* at 676-77.

168. *Id.* at 676.

169. *Id.* at 671 (notice of appeal), 668 (date of issuance of opinion).

170. 729 N.E.2d 972 (Ind. 2000).

171. *Collins v. Day*, 644 N.E.2d 72, 74-75 (Ind. 1994).

suspect classes or impinging upon fundamental rights but other such grants as well.”<sup>172</sup> Law students long have been taught that the trick to winning or losing an equal protection case was to get into the right level of scrutiny, because showing that a “suspect class” or “fundamental right” was at issue would require application of “strict scrutiny” and almost guarantees that the classification will be invalidated.<sup>173</sup> The Indiana Supreme Court avoided that analytical pitfall, but ironically created a new one involving how to define the classes to be compared. Several cases decided in the most recent year illustrate this problem.

1. *Zoning*.—In *Dvorak v. City of Bloomington*,<sup>174</sup> the Indiana Supreme Court rejected an Equal Privileges Clause challenge to zoning restrictions that apply to unrelated individuals. A Bloomington ordinance restricted property in certain zones from being occupied by more than four adults unrelated by blood, marriage or adoption.<sup>175</sup> In these “family residential” zones, families of any size and non-families consisting of fewer than four unrelated adults were permitted.<sup>176</sup> Landlords challenged this ordinance, claiming that it violated the equal privileges of unrelated persons because the ordinance did not preclude more than four related adults from living together.<sup>177</sup>

Plaintiffs claimed that there was no valid basis for the ordinance because the impact on traffic, parking, utilities, trash, noise and the like was the same from any household containing more than four adults, whether those persons were related or unrelated.<sup>178</sup> Under *Collins*’s framework, they argued, there were no inherent differences between groups of more than four unrelated persons and groups of more than four related persons justifying the different treatment.<sup>179</sup>

The court made two points regarding analysis under section 23.<sup>180</sup> First, because the landlords were challenging the ordinance, it was up to them to negate any conceivable basis for it; the city had no burden of proof to show valid reasons for the classification.<sup>181</sup> Second, the Equal Privileges Clause focuses only on different legislative treatment.<sup>182</sup> Contrary to the thrust of the landlords’ argument, the *treatment* of different classes, not the *purposes* of the legislation, must be reasonably related to inherent characteristics of the differently treated groups.<sup>183</sup>

The court unanimously approved the classification, holding that “considering

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172. *Id.* at 80.

173. *E.g.*, RONALD D. ROTUNDA & JOHN E. NOVAK, TREATISE ON CONSTITUTIONAL LAW § 18.3, at 213-20 (3d ed. 1999) (emphasizing standards of review).

174. 796 N.E.2d 236 (Ind. 2003).

175. *Id.* at 237 (citing Bloomington Municipal Code 20.02.01.00).

176. *Id.*

177. *Id.*

178. *Id.* at 238.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 238-39.

183. *Id.* at 239.



whether groups are or are not families is obviously related to determining whether to exclude them from districts zoned for family residential use.”<sup>184</sup> The court ruled that “limiting multiple-adult households in single family residential zones to families, and excluding non-families, is reasonably related to the difference between families and non-families.”<sup>185</sup>

In *Dvorak*, the court reiterated and applied settled analytical methods, and there was no dispute (either between the parties or among the court) as to the classifications to be compared. The makeup of the classifications was not disputed, only whether the classifications related to the subject matter of the ordinance. The court affirmed the appropriateness of categorizing families differently from unrelated persons and rejected the plaintiffs’ reliance on the purpose of the law rather than the treatment of affected classifications.

2. *Medicaid Payment for Abortions*.—The court’s decision in *Humphreys v. Clinic for Women, Inc.*<sup>186</sup> displayed the uncertainty around how to determine which categories to compare for section 23 purposes.

The plaintiffs in *Humphreys* attacked the provisions of Indiana’s Medicaid program that restricted Medicaid reimbursement for certain abortions.<sup>187</sup> Indiana Code section 12-15-5-1(17) restricts Medicaid payments for abortions to cases in which the mother’s life is in danger or when the pregnancy was caused by rape or incest. Outside the abortion area, in contrast, Medicaid pays for “virtually all non-experimental, medically necessary health care, including some services for which federal reimbursement is not available.”<sup>188</sup> The plaintiffs complained that pregnant women were treated unconstitutionally by Indiana’s Medicaid program because they could receive Medicaid payment for all “medically necessary” procedures except abortions, which were covered more selectively.<sup>189</sup>

Indiana’s statutory restriction on Medicaid payment for abortions mirrored federal law.<sup>190</sup> The U.S. Supreme Court determined in 1980 that the federal “Hyde Amendment”—stating that federal Medicaid funds could only be used for abortions when the mother’s life is in danger or when the pregnancy was caused by rape or incest—did not violate the Federal Constitution.<sup>191</sup>

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184. *Id.* at 239-40. The U.S. Supreme Court has recognized a fundamental constitutional right for persons related to one another to live under the same roof. *Moore v. City of E. Cleveland*, 431 U.S. 494, 537-38 (1977). Under *Moore*, Bloomington likely could not have restricted its definition of “family” to four or fewer related adults.

185. *Dvorak*, 796 N.E.2d at 239.

186. 796 N.E.2d 247 (Ind. 2003).

187. Medicaid pays for medical care for eligible low-income persons. It is a joint federal-state program governed by a complex and lengthy series of federal and state statutes and rules. Participating states must comply with federal statutes and rules. Medicaid pays claims submitted by health care providers; it does not directly pay eligible low-income persons. *Id.* at 249-50.

188. *Id.* at 250.

189. *Id.* at 254.

190. *Id.* at 249-50.

191. *Id.* at 250 (citing *Harris v. McRae*, 448 U.S. 297 (1980)).

Medicaid payments comprise both State and federal funds.<sup>192</sup> For most covered medical procedures, the federal government matches State expenditures at a rate of approximately two to one.<sup>193</sup> For abortions prohibited by the Hyde Amendment, however, no federal funds are available.<sup>194</sup> Thus, if states choose (or are constitutionally required) to cover those procedures, they must pay for the abortions with state funds only.<sup>195</sup> Under section 23, the court applies a two-step analysis: "First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated."<sup>196</sup> Courts are to be deferential to legislative discretion in applying this standard.<sup>197</sup> The *Humphreys* trial court had concluded that the statutory limitation on Medicaid payment for abortions facially violated the Equal Privileges and Immunities Clause because the Medicaid benefit was not provided equally to all.<sup>198</sup> That is, certain Medicaid-eligible women could not receive Medicaid reimbursement for a "medically necessary" abortion (it was undisputed that some abortions are medically necessary but neither threaten the mother's life nor are caused by rape or incest) although all other eligible men and women would receive reimbursement for other "medically necessary" treatments.<sup>199</sup>

In analyzing the plaintiffs' claims, the court first had to determine how to define the legislative categories at issue in the case:

The parties here define the relevant classification differently. The plaintiffs contend (and the trial court agreed) that the legislative classification at issue places (1) "indigent men and indigent women who need treatment (other than abortion) which is medically necessary to preserve their health" into a class for which the necessary treatment is provided, and (2) "indigent pregnant women needing to terminate their pregnancy to preserve and protect their health" into a class for which the necessary treatment is not provided. The State argues that the relevant classification is between (1) "medically necessary services and supplies" for which federal Medicaid reimbursement at some level is available (a class that includes abortions to save a woman's life and where pregnancy resulted from rape or incest) and (2) medically necessary services and supplies for which it is not (a class that includes all other medically

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192. *Id.* at 249.

193. *Id.* at 249-50. In 2000, the federal rate was 61.7%. Indiana Medicaid Program, *FY 2000 Annual Report*, [www.in.gov/fssa/servicedisabl/mcicaid/2000report.pdf](http://www.in.gov/fssa/servicedisabl/mcicaid/2000report.pdf).

194. *Humphreys*, 796 N.E.2d at 249-50, 255.

195. *Id.* at 255.

196. *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994).

197. *Id.*

198. *Humphreys*, 796 N.E.2d at 252.

199. *Id.*



necessary abortions).<sup>200</sup>

Justice Sullivan, who authored the majority opinion, began his analysis of which classification scheme was appropriate by quoting another key section 23 opinion, *McIntosh v. Melroe Co.*: “It is the claim, not any innate characteristic of the person [i.e. plaintiff], that defines the class.”<sup>201</sup> In *McIntosh*, where each side also asserted a different definition of the relevant classifications, the majority opinion held that the relevant characteristics for section 23 purposes were not necessarily innate in the plaintiffs.<sup>202</sup> Rather, courts should look to the outlines of the legal claim to determine the relevant categories for section 23 purposes.<sup>203</sup>

With little additional analysis, the *Humphreys* majority stated that “[w]e think the claim here, reduced to its essentials, is that some Medicaid-eligible pregnant women in Indiana are entitled to Medicaid-financed medically necessary abortions and others are not. We think this ‘claim . . . defines the class . . . .’”<sup>204</sup> Justice Sullivan noted that although the majority’s definition “differs somewhat from those advanced by the parties,” the classes were sufficiently similar to both parties’ submissions as to preserve all the arguments the parties advanced.<sup>205</sup>

The majority went on to address the merits of the plaintiffs’ claim that the Medicaid statute facially violated the Equal Privileges and Immunities Clause, looking first at whether inherent differences between the classes justified different treatment.<sup>206</sup> He quoted the plaintiffs’ claim that the class ineligible for Medicaid payment for medically necessary abortions is “inherently the same in ways that relate directly to the subject matter of the Medicaid legislation” as the class that gets payment for other medically necessary medical treatment: both groups are eligible for Medicaid and seek “medical care for which they have a medical need.”<sup>207</sup> The only difference between the two groups is that one group seeks abortion while the other seeks other treatment, and that difference does not

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200. *Id.* at 253-54 (citations omitted).

201. *Id.* at 254 (quoting *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 981 (Ind. 2000)).

202. *McIntosh*, 729 N.E.2d at 981.

203. *Id.* Justices Dickson and Rucker dissented in *McIntosh*, arguing that classifications for section 23 purposes must focus upon the “unequally treated class of *people*. When a statute is challenged as violating Section 23, we must evaluate the disparate treatment afforded to the benefited or burdened class.” 729 N.E.2d at 992 (emphasis in original). *McIntosh* analyzed a products liability statute of repose. The majority focused on the difference between older and newer products, finding inherent differences permitting different treatment of older products. The dissenters focused on persons injured by products, finding no inherent differences between persons injured by older products and persons injured by newer products.

204. *Humphreys*, 796 N.E.2d at 254.

205. *Id.*

206. *Id.* at 254-57.

207. *Id.* at 255.

relate to the subject matter of Medicaid, they argued.<sup>208</sup>

The State advanced three justifications for its statute.<sup>209</sup> First, because federal funds are not available for the abortions at issue, it would not be fiscally prudent or administratively convenient to cover those abortions.<sup>210</sup> Second, the State has a compelling interest in protecting fetal life.<sup>211</sup> Third, the State advanced other reasons of fiscal and administrative efficiency to justify the statute, arguing that State officials should be able to control fiscal policy.<sup>212</sup>

The court determined that the section 23 analysis involved balancing the State's justifications against the problem identified by the plaintiffs, a characterization that departs from the traditional focus in article I, section 23 cases on whether "inherent difference" in the classes reasonably relate to their different treatment.<sup>213</sup> In undertaking the balancing, the court described the plaintiffs' uncontroverted evidence that women confront serious health risks in pregnancy that may be alleviated by abortions that are not covered by Indiana's Medicaid program.<sup>214</sup> In light of this evidence, the court reformulated the issue in the case as

whether the Legislature may prohibit the State from paying for an abortion for a Medicaid-eligible pregnant woman facing any of these health risks while at the same time it authorizes the State to pay for an abortion to preserve the life of a Medicaid-eligible pregnant woman or where the pregnancy was caused by rape or incest.<sup>215</sup>

The majority on this issue, made up of Justices Sullivan and Dickson and Chief Justice Shepard, concluded that the State's interests in protecting fetal life and the State's fisc and advancing administrative efficiency outweighed the plaintiffs' interests.<sup>216</sup> While acknowledging the negative consequences for low-income women, the majority concluded that the State's justifications were not arbitrary or manifestly unreasonable, and therefore withstood analysis under the first prong of *Collins*.<sup>217</sup>

The majority also concluded that the statute satisfied the second *Collins* prong, whether the treatment accorded the class is provided to all who share the inherent characteristics that justify the class.<sup>218</sup> The majority found that

because the plaintiffs "challenge not the provision of Medicaid benefits

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208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 256.

214. *Id.*

215. *Id.* at 256-57.

216. *Id.* at 257.

217. *Id.*

218. *Id.*



to indigent people generally, but rather the deprivation of Medicaid benefits to some who seek abortions, it is clearer to frame the issue as whether that deprivation is uniformly applicable to all who share the inherent characteristics that justify the classification.”<sup>219</sup>

Because Indiana Medicaid pays for abortions for all those who require it to preserve their lives or whose pregnancies resulted from rape or incest, the second prong was met.<sup>220</sup>

The court then went on to address the plaintiffs’ as-applied challenge to the statute, and the three-justice majority shifted.<sup>221</sup> The majority in the as-applied portion of the case consisted of Justices Sullivan, Boehm and Rucker.<sup>222</sup> The as-applied claim related not to all pregnant women, but only those with pregnancies that “create serious risk of substantial and irreversible impairment of a major bodily function.”<sup>223</sup> The majority did not draw this classification from thin air, but rather from other abortion-related statutes on the books in Indiana.<sup>224</sup> The General Assembly identified this group as meriting special treatment in Indiana’s abortion-control law.<sup>225</sup> Women with pregnancy-related conditions that create serious risks of substantial and irreversible impairment of a major bodily function are exempted from the usual eighteen-hour waiting period other women must undergo before having abortions.<sup>226</sup> Thus, the General Assembly concluded that these women already are entitled to special treatment because of their health conditions.<sup>227</sup>

The majority then concluded that “the characteristics that distinguish Medicaid-eligible pregnant women whose pregnancies create serious risk of substantial and irreversible impairment of a major bodily function [are] virtually indistinguishable from the characteristics of women for whose abortions the State does pay.”<sup>228</sup> They found no inherent characteristics justifying different treatment of women whose pregnancies create serious risks of substantial or irreversible impairment of a major bodily function as compared to women whose pregnancies placed their lives in danger.<sup>229</sup>

The State argued that its different treatment of abortions where the mother’s

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219. *Id.* (quoting Brief of Appellants at 23).

220. *Id.*

221. *Id.* at 257-59.

222. *Id.* at 260.

223. *Id.* at 257.

224. *Id.* (quoting IND. CODE § 16-18-2-223.5 (1998)).

225. *Id.* at 259.

226. *Id.* (citing IND. CODE §§ 16-18-2-223.5 and 16-34-2-1.1).

227. *Id.* at 259. This “medical emergency” exception to abortion waiting period statutes is constitutionally required. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *A Woman’s Choice—E. Side Women’s Clinic v. Newman*, 671 N.E.2d 104, 107-10 (Ind. 1996) (construing Indiana law in response to certified question).

228. *Humphreys*, 796 N.E.2d at 258.

229. *Id.*

life is at stake or the pregnancy was caused by rape or incest was justified by "medical, moral, social, and ethical concerns."<sup>230</sup> The majority rejected this assertion, stating that risk to the woman's life clearly related to medical, moral and ethical concerns that might justify different treatment, but the State's inclusion of pregnancies caused by rape or incest did not rise to the same life-threatening level.<sup>231</sup> The majority wrote:

[I]f the "medical, moral, social, and ethical concerns" that justify Medicaid-funded abortions do not *require* that the life of the pregnant woman be at stake, what are the inherent characteristics that distinguish the abortions permitted by the "preserve the life, rape, or incest" classification from cases where the pregnant woman faces substantial and irreversible impairment of a major bodily function?<sup>232</sup>

The majority could find no dividing line, and it concluded that the State's different treatment of women facing potential substantial and irreversible impairment of a major bodily function as compared to those whose life was at risk could not be justified, especially given that both groups were treated identically for purposes of the abortion-control law.<sup>233</sup> The court therefore held the statute unconstitutional as applied, requiring the Medicaid program to pay for abortions for women facing substantial and irreversible impairment of a major bodily function as well as those whose lives were at risk and whose pregnancies resulted from rape or incest.<sup>234</sup>

Three justices wrote separately.<sup>235</sup> Chief Justice Shepard, who was in the majority on the facial challenge, but not the as-applied portion of the opinion, wrote briefly to state his view that the legislatively drawn lines at issue in the case are not "so arbitrary and unreasonable that they are unconstitutional."<sup>236</sup>

Justice Dickson, also in the majority on the facial challenge but not the as-applied portion, wrote at greater length about section 23 analysis.<sup>237</sup> Justice Dickson wrote *Collins*, the opinion that set the standard applied in *Humphreys* and other section 23 cases.<sup>238</sup>

Justice Dickson first addressed the facial challenge, stating his preference to address the specific classifications that were identified by the plaintiffs-appellees and trial court as receiving *unequal* treatment: (1) indigent men and women who need treatment (other than abortion) which is medically necessary to preserve their health, and (2) indigent

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230. *Id.* (quoting Brief of Appellants at 18).

231. *Id.* at 258-59.

232. *Id.* at 258 (emphasis in original).

233. *Id.* at 258-59.

234. *Id.* at 259-60.

235. *Id.* at 260.

236. *Id.*

237. *Id.* at 260-64.

238. *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).



pregnant women needing to terminate their pregnancy to preserve and protect their health but whose pregnancies do not threaten their lives and were not the result of rape or incest.<sup>239</sup>

Justice Dickson stated that these classifications compare the treatment received by the two groups, and “[t]his disparate treatment is clearly related to the inherent characteristic that distinguishes the unequally treated classes: namely, the medical treatment in the second classification, abortion, requires the termination of fetal life.”<sup>240</sup> This difference is inherent and legitimate, Justice Dickson wrote, and justifies the different treatment.<sup>241</sup>

Justice Dickson went on to criticize the majority’s as-applied analysis.<sup>242</sup> He criticized the majority for comparing the group of women whose pregnancies present a serious risk of substantial and irreversible impairment of a major bodily function with “a single classification [of] both those abortions needed to preserve the life of a pregnant woman and those abortions for pregnancies resulting from rape and incest.”<sup>243</sup> Rather, he suggested, two comparisons are necessary. First, the group of women whose pregnancies present a serious, but not life-threatening, health risk should be compared to those whose pregnancies threaten their lives.<sup>244</sup> Second, the group of women with serious, but not life-threatening health conditions should be separately compared to women whose pregnancies resulted from rape or incest.<sup>245</sup> Failure to make these separate comparisons, Justice Dickson stated, caused the majority in the as-applied portion to come to the wrong conclusion by conflating two separate legislative purposes.<sup>246</sup>

When the separate comparisons are made, Justice Dickson wrote, it is easier to see legislative motives and determine that the law does not violate section 23.<sup>247</sup> In the first comparison, the General Assembly could legitimately allow Medicaid assistance for those whose pregnancies threaten their lives, differentiating those pregnancies with substantial, but not life-threatening, risk to promote the legitimate goal of preserving fetal life.<sup>248</sup> In the second comparison, the General Assembly could single out for Medicaid assistance those abortions caused by “criminal conduct,” an element not related to the mother’s health at all.<sup>249</sup>

Justice Dickson concluded that the majority’s failure to perform these separate comparisons failed to give sufficient deference to legislative line-

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239. *Humphreys*, 796 N.E.2d at 260-61 (Dickson, J., dissenting) (emphasis added).

240. *Id.* at 261 (Dickson, J., dissenting).

241. *Id.*

242. *Id.* at 261-64 (Dickson, J., dissenting).

243. *Id.* at 261.

244. *Id.* at 261-62.

245. *Id.*

246. *Id.* at 262.

247. *Id.*

248. *Id.*

249. *Id.*

drawing, contrary to *Collins*'s command.<sup>250</sup> Also, Justice Dickson wrote, importing the definition of "serious risk of substantial and irreversible impairment of a major bodily function" from the abortion-control law, the majority failed to take account of the fact that the General Assembly could have different motives relating to spending Medicaid funds (governed by the Medicaid statute) than for requiring information to be provided to pregnant women considering abortion (the purpose of the abortion-control law).<sup>251</sup> He concluded that although plaintiffs' facial challenge failed, the majority's conclusion regarding the as-applied challenge "has the effect of granting almost all the relief sought by the plaintiffs in this case."<sup>252</sup>

Justice Boehm, joined by Justice Rucker, dissented on the facial challenge.<sup>253</sup> He began by noting that twelve of the seventeen states that had addressed similar state constitutional challenges to Medicaid funding restrictions on abortion had invalidated the restrictions.<sup>254</sup>

Justice Boehm described the plaintiffs' complaint as advancing "a constitutionally impermissible distinction arising from Medicaid's refusal to fund medically necessary abortions for certain indigent women while providing benefits for all other indigents in need of medical treatment. The plaintiffs are entitled to frame their own complaint, so this different treatment is the issue presented in this case."<sup>255</sup> Plaintiffs did not base their challenge on funding for pregnancies arising from rape or incest, only on the failure to pay for "medically necessary" abortions as Medicaid pays for other medically necessary procedures.<sup>256</sup>

Justice Boehm stated that although the *Collins* test generally is described as having two prongs, "it really breaks down into three components because the first 'prong' establishes two requirements: 1) the classification must be based on 'characteristics' that 'rationally distinguish the unequally treated class,' and 2) the 'disparate treatment' must be 'reasonably related' to the characteristics that define the class."<sup>257</sup> These two elements are combined with "a third test: everyone who is in fact in the class (i.e., everyone who shares the defining characteristic) must be treated alike, and everyone who is not in the class must be treated alike."<sup>258</sup>

Justice Boehm postulated that the relevant characteristics in this case are entitlement to Medicaid and the desire for medically necessary treatment.<sup>259</sup> He found that some indigent women with these characteristics—those who have a

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250. *Id.*

251. *Id.*

252. *Id.* at 264.

253. *Id.* at 264-71 (Boehm, J., dissenting).

254. *Id.* at 264.

255. *Id.* at 265.

256. *Id.*

257. *Id.*

258. *Id.* at 266.

259. *Id.*



medical need for abortion but will not die if they do not get it—are treated differently from all others who seek medically necessary treatment.<sup>260</sup>

Accepting the majority's view that "the reasonableness of the relationship between the classification and the legislative objective turns on a balancing test," Justice Boehm concluded that the majority balanced the interests incorrectly.<sup>261</sup> He reviewed the history of the 1851 Constitution, noting that "the Indiana Constitution is rife with provisions asserting the primacy of individual rights," reflecting the populism motivating many provisions of the constitution.<sup>262</sup> "In the same vein, the Indiana Equal Privileges Clause elevates individual rights by requiring more than some mere recognized governmental interest to justify legislation that overrides the interests of the individual."<sup>263</sup> Applying that standard in this case, Justice Boehm concluded that the individual woman's interest in a medically necessary abortion outweighed the governmental interest in protecting fetal life.<sup>264</sup> He wrote that the case presented a conflict between individual rights and the State's desire, expressed by placing a financial penalty on the woman's ability to exercise her constitutional right to choose abortion.<sup>265</sup>

[T]he State seeks to prioritize the interest it advances over the woman's right to choose. Whether the State seeks to advance its interest by criminalizing abortions, as it no longer can do, or by creating legislation that penalizes the exercise of that right, either is, as a matter of constitutional priorities, an unreasonable balance. As such, this legislation imposes an unreasonable classification and is invalid under *Collins*.<sup>266</sup>

Justice Boehm contrasted this state constitutional analysis with federal equal protection analysis, explaining why the state constitutional question should be decided differently than the supreme court decided the equal protection question in *Harris*.<sup>267</sup> The federal standard is lower, he wrote.<sup>268</sup> Because the restriction on Medicaid funding of abortions involves neither a fundamental right nor a suspect classification, the United States only had to show that its restriction on Medicaid funding of abortions bore a rational relationship to a legitimate governmental purpose.<sup>269</sup> Under Indiana's Equal Privileges and Immunities Clause, however, there are no levels of scrutiny.<sup>270</sup> Rather, every classification is analyzed under *Collins*'s two-part (or, as Justice Boehm sees it, three-part) test

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260. *Id.*

261. *Id.* at 270.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 266-70.

268. *Id.* at 269.

269. *Id.*

270. *Id.*

analyzing whether the classification is reasonably related to inherent differences between the groups.<sup>271</sup>

The majority and dissenters on the facial challenge adopted essentially the same classifications for section 23 purposes but analyzed them quite differently.<sup>272</sup> Both groups compared Medicaid recipients eligible for medically necessary services to Medicaid recipients who could obtain medically necessary Medicaid-paid abortions only under strict statutory limits.<sup>273</sup> The majority found an inherent difference between the two groups based on the State's fiscal concerns and its interest in preserving fetal life.<sup>274</sup> The dissenters essentially accepted the categories but rejected the majority's balancing.<sup>275</sup> Relying on the populist, individual rights-favoring background of the 1851 Constitution, the dissenters asserted that the plaintiffs' individual right to access to abortion outweighed the State's interests.<sup>276</sup>

No justice accepted the State's categorization relating to the facial challenge, which turned on the availability of federal funding for the procedures at issue.<sup>277</sup> While rejecting the classification, however, the majority's refutation of the facial challenge hinged in part on the unavailability of federal funds as a legitimate reason for different treatment of one class.<sup>278</sup>

In the as-applied analysis, the majority and dissenters differed substantially on how to define the classes.<sup>279</sup> The majority drew its classification (pregnancies that "create serious risk of substantial and irreversible impairment of a major bodily function") from the abortion-control statute.<sup>280</sup> Justice Dickson took issue with this approach, noting that the abortion-control law had an entirely different purpose.<sup>281</sup> He posited that two comparisons were necessary: first, women with health risks from abortion should be compared to women likely to die from abortions; second, women with health risks from abortion should be compared to women whose pregnancies arose from "criminal conduct," rape or incest.<sup>282</sup> In his view, inherent differences justifying different treatment would be obvious from these separate comparisons.<sup>283</sup>

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271. *Id.*

272. Justice Dickson, concurring with the majority on the facial challenge, nevertheless disagreed with the majority's version of the categories to be compared. He advocated accepting the categories as advanced by the plaintiffs without even the minor rephrasing engaged in by the majority.

273. *Humphreys*, 796 N.E.2d at 254, 265.

274. *Id.* at 257.

275. *Id.* at 270.

276. *Id.*

277. *Id.* at 253-54.

278. *Id.* at 257.

279. *Id.*

280. *Id.* at 258-59.

281. *Id.* at 261.

282. *Id.* at 262.

283. *Id.*



These different approaches illustrate that the court has not yet settled on a method for classification in section 23 claims.

3. *Employment Benefits for Unrelated Persons.*—In *Cornell v. Hamilton*,<sup>284</sup> the Indiana Court of Appeals addressed a state employee's claim that she should be able to have the same funeral leave to attend her lesbian partner's parent's funeral as she would receive to attend her spouse's parent's funeral if she were married.<sup>285</sup> Cornell argued that the state policy violated the Equal Privileges and Immunities Clause because her classification, state employees not given leave for the funeral of a partner's parent, was not inherently different from the category of State employees who could obtain leave for a spouse's parent's funeral, yet the two categories were treated differently.<sup>286</sup>

The court of appeals concluded that "the State's personnel paid leave policy does create a classification because it extends the privilege only to married employees, creating the classes of married and unmarried employees."<sup>287</sup> The State's justifications for the classifications included promoting marriage, encouraging procreation, and eliminating the administrative problems of determining who would qualify for benefits as a "domestic partner."<sup>288</sup> The court of appeals rejected these justifications, noting that many universities and private employers had overcome them in offering a variety of domestic partner benefits.<sup>289</sup>

The court of appeals also stated that "the policy exists to strengthen family relationships, and families are different today than they once were."<sup>290</sup> Cornell had conceded in this case, however, that the classification was rationally related to marriage.<sup>291</sup> Based on "Cornell's framing of the issue, [the court was] not faced with the close question of whether, in this age of changing family relationships, the policy's distinction based on marital status is rational, but whether the privilege is equally available to all persons similarly situated."<sup>292</sup>

Cornell argued that the policy was unconstitutional as applied to her because she could never bring herself within its scope—she was prohibited by statute from marrying her lesbian partner.<sup>293</sup> She argued that, like the plaintiff in *Martin v. Richey* who was unable to discover her injury from medical malpractice during the applicable limitations period, she could never bring herself within the favored class.<sup>294</sup> But the court of appeals applied a different analysis. It reasoned that *Martin* was a case about a burden, where the analytical focus is on the disfavored

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284. 791 N.E.2d 214 (Ind. Ct. App. 2003).

285. *Id.* at 215.

286. *Id.* at 215-16.

287. *Id.* at 219.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at 219-20.

294. *Id.* at 220 (citing *Martin v. Richey*, 711 N.E.2d 1273, 1279-82 (Ind. 1999)).

group (that is, the group that was barred by the statute of limitations).<sup>295</sup> Cornell's claim, in contrast, was about a privilege or benefit, and courts in those cases should follow *Collins*'s lead by focusing on distribution of the privilege within the privileged class.<sup>296</sup>

The court of appeals concluded that because all members of the favored class (married persons) were treated the same, there was no violation of the Equal Privileges and Immunities Clause.<sup>297</sup> Because Cornell conceded that the classification was rationally related to marriage, she effectively conceded that she was not similarly situated to those in the class receiving the benefit, and her claim could not succeed.<sup>298</sup>

The court of appeals deduced the different treatment of "benefited" versus "burdened" classes from previous case law, but no Indiana Supreme Court opinion has explicitly drawn this distinction. Time will tell whether the Indiana Supreme Court will adopt this approach.

### *B. Open Courts and Equal Privileges*

In *AlliedSignal, Inc. v. Ott*,<sup>299</sup> the Indiana Supreme Court analyzed Indiana's statutes pertaining to lawsuits over products containing asbestos. Indiana's statute of repose governing products liability cases generally requires that actions for defective products be filed within two years after the cause of action accrues and within ten years of delivery of the product to the initial user or consumer.<sup>300</sup> The provisions for defendants who "mined and sold commercial asbestos" and certain funds created in bankruptcies to pay asbestos-related personal injury and property damage claims are different, however.<sup>301</sup> When a product liability action is based on personal injury, disability, disease or death resulting from exposure to asbestos, there is no ten-year statute of repose. "Accrual" of the claim is deemed to be the time when the injured person knows that he or she has an asbestos-related disease or injury.<sup>302</sup>

Before addressing constitutional issues, the court first tackled statutory interpretation.<sup>303</sup> The court defined "commercial asbestos" to mean raw or processed asbestos before it is incorporated into other products, significantly limiting the scope of the more forgiving limitations period by restricting it to those selling raw or processed asbestos.<sup>304</sup> The court also interpreted the statute literally to limit the reach of the exception to entities that both mined *and* sold

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295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. 785 N.E.2d 1068 (Ind. 2003).

300. IND. CODE § 34-20-3-1 (2003).

301. IND. CODE § 34-20-3-2 (2003); *AlliedSignal*, 785 N.E.2d at 1070.

302. IND. CODE § 34-20-3-2.

303. *AlliedSignal*, 785 N.E.2d at 1071-73.

304. *Id.*



commercial asbestos, not those that merely sold it after it was mined by others.<sup>305</sup>

The court then examined whether the statute, so interpreted, complied with relevant constitutional provisions.<sup>306</sup> The court looked first at article I, section 12, which provides that "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law."<sup>307</sup> Borrowing from the court of appeals' opinion in a related case, the court determined that section 12 could apply in three different ways:

First, is the statute constitutional as applied to a plaintiff who is exposed to asbestos from and injured by a product more than ten years after that product's initial delivery? Second, is the statute constitutional as applied to a plaintiff who is injured by a product within ten years of its initial delivery, but who has neither knowledge of nor any ability to know of that injury until more than ten years have passed? Third, in the absence of evidence of the length of time between a product's initial delivery and an injury . . . can the statute constitutionally be applied to a plaintiff who was injured by a product before [the statute of repose's] passage?<sup>308</sup>

The court concluded that if the plaintiff's first exposure to asbestos occurred more than ten years after its delivery, the defendants would be protected by the statute of repose and no constitutional problem would be present. In the court's view, the legislature simply had defined the cause of action to include only those injuries that occurred before ten years had passed since the delivery of the product to its initial user, the same approach it approved as to the general products liability statute of repose in *McIntosh v. Melroe Co.*<sup>309</sup>

As to the second question, the court relied on *Martin v. Richey*,<sup>310</sup> which held that section 12 was violated as applied when a plaintiff was injured within the limitations period but, without fault, was unable to discover the injury until after the limitations period had passed.<sup>311</sup> In such cases, statutes of limitation cannot be applied consistently with section 12 because the plaintiff possesses a cause of action but is unable to obtain access to the courts through innocent lack of knowledge.<sup>312</sup>

Through statutory interpretation, however, the court significantly limited the number of times this issue would arise: "We hold that, with respect to asbestos claims under [the statute of repose], a cause of action accrues at that point at which a physician who is reasonably experienced at making such diagnoses could

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305. *Id.*

306. *Id.* at 1073-77.

307. IND. CONST. art. I, § 12.

308. *AlliedSignal*, 785 N.E.2d at 1074 (quoting *Jurich v. Garlock, Inc.*, 759 N.E.2d 1066, 1071 (Ind. Ct. App. 2001)).

309. *Id.* at 1074 (citing *McIntosh v. Melroe Co.*, 729 N.E.2d 972 (Ind. 2000)).

310. 711 N.E.2d 1273 (Ind. 1999).

311. *AlliedSignal*, 785 N.E.2d at 1074-75.

312. *Id.*

have diagnosed the individual with an asbestos-related illness or disease.”<sup>313</sup> The court therefore set the relevant time of accrual of the injury for limitations purposes at the point of discovery by an experienced physician.<sup>314</sup> “In our view, it is only when the disease has actually manifested itself (and therefore could be diagnosed by a reasonably experienced physician) that the cause of action accrues.”<sup>315</sup> The plaintiff can proceed only if a reasonably experienced physician could have diagnosed the asbestos-related condition during the limitations period.<sup>316</sup> The plaintiff’s claim would not be time-barred under the theory of *Martin v. Richey* only if the plaintiff had no reason to know of the condition until after the ten-year limitations period had expired, although an experienced physician could have diagnosed it during the limitations period.<sup>317</sup> The court directed the trial court to determine the facts relevant to this theory on remand.<sup>318</sup>

The court then examined the third question, whether the ten-year statute of repose can constitutionally be applied to claims that accrue before it was enacted.<sup>319</sup> The court of appeals had ruled that such a plaintiff would have a vested right in his common law claim that could not be taken away retroactively by the statute of repose (which was enacted in 1978).<sup>320</sup> The court did not definitively answer this question. It noted that the condition would have had to be diagnosable by an experienced physician before 1978 to fall within the theory, and it stated that “a plaintiff’s right to pursue such a claim may in some circumstances be subject to changes in common law or statute.”<sup>321</sup> The court also noted that a plaintiff would have a right to sue the miner and seller of the asbestos and certain asbestos bankruptcy funds without regard to the statute of repose and could exercise his rights under the Open Courts Clause of section 12 in that manner.<sup>322</sup> This discussion implied that the rights available against some defendants not subject to the statute of repose might be sufficient to satisfy the Open Courts Clause.

The court then rejected a challenge to the special asbestos limitations periods raised under article I, section 23.<sup>323</sup> The court agreed with plaintiff’s contention that the statute created a special classification for plaintiffs harmed by asbestos.<sup>324</sup> But the court declined to apply the common *Collins v. Day*<sup>325</sup> test to the classification, reasoning that the classification ran in the plaintiff’s favor, so

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313. *Id.* at 1075.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 1075-76.

321. *Id.* at 1076.

322. *Id.*

323. *Id.* at 1076-77.

324. *Id.* at 1077.

325. 644 N.E.2d 72, 80 (Ind. 1994).



the plaintiff was helped rather than harmed by it and therefore could show no damage arising from the special limitations period.<sup>326</sup>

Justice Dickson dissented, joined by Justice Rucker.<sup>327</sup> He disagreed with the majority's construction of the statutory language, concluding that the legislature intended to include asbestos incorporated into products intended for commerce as "commercial asbestos" and that it intended "persons who mined and sold" to mean "persons who mined and persons who sold" asbestos.<sup>328</sup>

On the constitutional claims, Justice Dickson would have held that the ten-year statute of repose violated section 12's Right to Remedy Clause because the latency period for asbestos-related illnesses is so long that they would usually be discovered after the statute of repose had run.<sup>329</sup> "This is precisely the circumstance that led this Court in *Martin v. Richey* to find that application of the medical malpractice two-year statute of limitations to the facts of that case violated Article 1, Section 12. . . ."<sup>330</sup> He also criticized the majority's statutory construction of the definition of when a claim accrues, finding it contrary to legislative intent.<sup>331</sup>

Justice Dickson also would have held that the statute violated article I, section 23, again challenging the majority's description of the relevant classification.<sup>332</sup> He disputed the majority's description of the relevant classifications being (1) asbestos victims and (2) other victims under the product liability law.<sup>333</sup> Rather, Justice Dickson asserted, the proper comparison is between (1) persons who contract asbestos-related diseases from exposure to raw asbestos (and therefore are not subject to the statute of repose) and (2) persons who contract asbestos-related diseases from exposure to asbestos-containing products.<sup>334</sup> Finding no inherent differences between the two groups of asbestos victims, Justice Dickson would have invalidated the statute of repose under section 23 because it treats the two groups differently.<sup>335</sup>

The difference between the classifications defined by the majority and dissent in *AlliedSignal* echo those in *McIntosh*, showing that the analytical problem first arising in *McIntosh* has not yet been resolved. The question is whether to analyze the claims in terms of the claimants themselves, as Justice Dickson has advocated (e.g. plaintiffs hurt by products more than ten years old compared to plaintiffs hurt by products less than ten years old) or more along the lines drawn by the statutes themselves (e.g. products more than ten years old compared to products less than ten years old).

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326. *AlliedSignal*, 785 N.E.2d at 1077.

327. *Id.* at 1078-84.

328. *Id.* at 1078-81.

329. *Id.* at 1081-83.

330. *Id.* at 1081.

331. *Id.* at 1082.

332. *Id.* at 1083; see also *supra* discussion Part II.A.2.

333. *AlliedSignal*, 785 N.E.2d at 1083.

334. *Id.*

335. *Id.*



*Humphreys*, *AlliedSignal*, and to some extent *Cornell*, show that the court has not finalized its interpretive framework for section 23 claims. Parties fashion classifications for analysis under section 23 that would support either outcome, validating or nullifying a statute. As shown by the very small number of statutes that have been invalidated under the *Collins* standard,<sup>336</sup> it is almost always possible to create classifications that withstand section 23 scrutiny. Although the court has continued to use its “claim defines the class” approach, that form of words does not yet sufficiently explain how classes are to be defined, as shown by frequent, strong dissents in section 23 cases.

The court has several alternatives in framing a section 23 standard. First, it could take Justice Dickson’s approach in *Humphreys* and accept the plaintiff’s classifications exactly as argued.<sup>337</sup> This approach might be insufficiently deferential to the legislature’s determination, contrary to *Collins*. Second, on the opposite end of the spectrum, the court could always adopt the classifications suggested by the entity defending the statute. This approach is most deferential to the legislature, but it may fail to give sufficient weight to those harmed by the law at issue. This approach may be implicit when the court recites that a classification opponent must “negate all possible bases” for the classification and most resembles rational basis review under the Equal Protection Clause. A third approach would accept the classifications of the statute’s defenders except in cases involving individual rights or core values under the Indiana Constitution.<sup>338</sup> In those cases, the court might entertain the plaintiff’s version of classifications or at least treat more skeptically the classifications advanced by the statute’s defenders. This mode of analysis, of course, is akin to the equal protection levels of scrutiny the court rejected in *Collins*, but that rejection has led directly to the classification conundrum now bedeviling the court.

### C. Open Courts and Privacy

*Doe v. O’Connor*<sup>339</sup> examined Indiana’s sex offender registry, raising due course of law issues under article I, section 12 and privacy concerns under article I, section 1. The sex offender registry required posting on the Internet, for an indefinite period of time, photographs and home addresses of persons who had been convicted of certain specified sex offenses.<sup>340</sup> Doe, the plaintiff, claimed a right to a hearing to determine his future dangerousness before his name could

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336. No reported cases have found a statute to be facially unconstitutional under the *Collins* standard. In both *Martin v. Richey* and *Humphreys*, a statute has been found unconstitutional as applied to one subgroup it affects.

337. *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 260-61 (Ind. 2003) (Dickson, J., concurring and dissenting).

338. See, e.g., *City Chapel v. City of South Bend*, 744 N.E.2d 443, 446 (Ind. 2001) (describing core values).

339. 790 N.E.2d 985 (Ind. 2003).

340. IND. CODE § 5-2-12-1 to -14 (2003). The program as required by federal law as a condition of receiving certain federal criminal justice grants. 42 U.S.C. § 14071 (2003).



be posted.<sup>341</sup>

The Indiana Supreme Court rejected Doe's argument that he was entitled to a pre-posting hearing under article I, section 12.<sup>342</sup> Doe argued that section 12's requirement of a "remedy by due course of law" for any "injury done to him in his . . . reputation" required the hearing on whether posting his identity on the Internet was justified by his future dangerousness.<sup>343</sup> Not so, said the court, because what Doe sought to establish, that he would not be dangerous in the future, had no legal relevance to whether his name would be posted.<sup>344</sup> The relevant statute required that his name be posted merely because of his past conviction, without reference to future dangerousness.<sup>345</sup> Because future dangerousness was not a relevant question under applicable law, Doe was not entitled to a hearing.<sup>346</sup> This holding followed the United States Supreme Court's reasoning on the same question under the Due Process Clause in *Connecticut Department of Public Safety v. Doe*,<sup>347</sup> and the Court reiterated that it uses the same analysis under section 12 for allegations of denial of procedural due process as the federal courts use under the Due Process Clause.<sup>348</sup>

Doe also argued that the law violated his right to privacy under article I, section 1.<sup>349</sup> Section 1 states that "all people are . . . endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness . . ."<sup>350</sup> The court analyzed Doe's claim that section 1 gave him a privacy right primarily by looking at the construction of similar constitutional language by other states' courts.<sup>351</sup> The court concluded that "[o]ther states also have construed constitutional provisions similar in wording to Art. I, Sec. 1 of the Indiana Constitution not to provide a *sole basis* for challenging legislation since the language is not so complete as to provide courts with a standard that could be routinely and uniformly applied."<sup>352</sup> The court further held that Doe's section 1 claim was essentially identical to his section 12 claim, again positing the right to a hearing before information about him could be posted.<sup>353</sup> Because his section 1 argument presented no different substantive claim, the court rejected it as well.<sup>354</sup>

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341. *Doe*, 790 N.E.2d at 987.

342. *Id.* at 989.

343. *Id.* at 988.

344. *Id.* at 989.

345. *Id.* at 986-87.

346. *Id.* at 989.

347. 538 U.S. 1 (2003).

348. 790 N.E.2d at 988-89.

349. *Id.* at 989-90.

350. IND. CONST. art. I, § 1.

351. *Doe*, 790 N.E.2d at 990-91.

352. *Id.* at 991 (emphasis added).

353. *Id.* at 991-92.

354. *Id.*

*D. Government Support of Religious Institutions*

In *Embry v. O'Bannon*,<sup>355</sup> the court analyzed a claim that a program supplying public school teachers to teach certain courses at private religious schools violated article I, section 6, which states that "[n]o money shall be drawn from the treasury, for the benefit of any religious or theological institution."<sup>356</sup> The program at issue assisted children in private schools by giving them instruction, yet it also helped public schools because they were able to count the private school's students for purposes of the formula awarding them State financial assistance.<sup>357</sup>

The court found that taxpayers had standing to challenge the program under the public standing doctrine.<sup>358</sup> On the standing issue, Justice Sullivan, joined by Chief Justice Shepard, wrote separately to discuss limitations on the public standing doctrine.<sup>359</sup> They noted that the doctrine, in their view, was prudential and should be applied cautiously.<sup>360</sup> They stated that the public standing doctrine should allow taxpayer standing only when the taxpayer asserts a specific and relatively clear constitutional limitation on the governmental action at issue.<sup>361</sup> Requiring a clear, explicit limit on governmental power as a prerequisite to standing assures that the courts will not exceed their proper role and retains standing principles as a bar against judicial overreaching into the domains of the other branches.<sup>362</sup>

In his opinion for the court on the merits of the section 6 question, Justice Dickson wrote that the framers' intent was to preclude the use of tax money to support any ministry or worship. Justice Dickson wrote that the framers did not clearly indicate their intention to prohibit support of sectarian schools.<sup>363</sup> To support this conclusion, Justice Dickson relied on contemporaneous dictionary definitions of "ministry" as well as constitutional language from neighboring states that prohibited state aid to religious schools more explicitly than the Indiana Constitution.<sup>364</sup> He discussed at length the early history of education in Indiana and anti-Catholic sentiment driving establishment of public schools in some states, though perhaps not Indiana.<sup>365</sup> Because the court was able to resolve the case on other grounds, however, Justice Dickson did not have to reach a firm

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355. 798 N.E.2d 157 (Ind. 2003).

356. IND. CONST. art. I, § 6.

357. 798 N.E.2d at 158-59.

358. *Id.* at 160; *see also* discussion of State *ex rel.* Cittadine v. Ind. Dep't of Transp., 790 N.E.2d 978 (Ind. 2003), *supra* Part I.A.

359. *Embry*, 798 N.E.2d 167-69.

360. *Id.* at 169 (quoting *Cittadine*, 790 N.E.2d at 983).

361. *Id.* at 168.

362. *Id.* (quoting *Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995) (noting that "standing is a key component in maintaining our state constitutional scheme of separation of powers")).

363. *Id.* at 161-64.

364. *Id.*

365. *Id.* at 162-63.



conclusion as to whether the expenditure limitations in section 6 apply to religious schools.<sup>366</sup>

The court concluded that the program did not violate section 6 because it did not provide "substantial benefits" to the participating religious schools. Justice Dickson admitted that the text and history of section 6 did not suggest that the "substantial benefit" standard was appropriate, but case law applying section 6 sanctioned the standard.<sup>367</sup> Again following recent trends, the court looked to other states' interpretations of similar constitutional language, noting that Wisconsin and Michigan also applied a "substantial benefit" standard.<sup>368</sup>

The court noted the plaintiffs' argument that the parochial schools received direct benefits from the program because they did not have to hire or pay teachers to provide the classes covered by the program.<sup>369</sup> The court rejected this perspective, finding that the programs provided significant educational benefits to parochial school students and helped the State attain its goal of encouraging education.<sup>370</sup> "[W]e find [that] any alleged 'savings' to parochial schools and their resulting opportunities for curriculum expansion would be, at best, relatively minor and incidental benefits of the dual-enrollment programs."<sup>371</sup> Because the program did not convey "substantial benefits" to any religious institution or directly fund religious activities, the court held that it did not violate section 6.<sup>372</sup>

Justice Boehm, joined by Justice Sullivan, concurred separately to express the view that the funding prohibition in section 6 applies to religious schools, a question the majority did not decide.<sup>373</sup> "[I]t seems quite a stretch to conclude that a parochial school is not a 'religious institution' within the meaning of [section 6]" especially because each school involved in the case teaches religious doctrine as part of its curriculum.<sup>374</sup> Justice Boehm questioned the majority's historical and linguistic analysis, concluding that the reference to religious institutions in section 6 encompasses religious schools.<sup>375</sup> Justice Boehm agreed

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366. *Id.* at 164.

367. *Id.* at 164-67 (citing *State ex rel. Johnson v. Boyd*, 28 N.E.2d 256 (Ind. 1940) (permitting public school takeover of religious school system in Vincennes, using parochial school staff and buildings and providing no religious instruction) and *Center Twp. v. Coe*, 572 N.E.2d 1350 (Ind. Ct. App. 1991) (invalidating state payment to religious institutions to provide poor relief, where relief was conditioned on beneficiaries' attendance at religious services but finding no per se violation of section 6 because religious institutions received payments for services)).

368. *Id.* at 165-66; see Laramore, *supra* note 5, at 987 (discussing growing reliance on interpretations by other states' courts of similar constitutional language and citing, *inter alia*, *Jordan v. Deery*, 778 N.E.2d 1264, 1268 (Ind. 2002)).

369. *Embry*, 798 N.E.2d at 166-67.

370. *Id.* at 167.

371. *Id.*

372. *Id.*

373. *Id.* at 169-70 (Boehm, J., concurring).

374. *Id.* at 169.

375. *Id.* at 169-70.

with the majority, however, that the crucial legal question is whether the program benefits the schools more than incidentally, and agreed with the majority's conclusion that it does not.<sup>376</sup>

### *E. Right to Counsel*

In *Malinski v. State*,<sup>377</sup> the Indiana Supreme Court continued the state's history of interpreting the right to counsel clause of article I, section 13 more broadly than the comparable federal provision (the Indiana Supreme Court famously held that the Indiana Constitution required appointed counsel for indigent criminal defendants almost a century before the U.S. Supreme Court so held.<sup>378</sup>) Interestingly, *Malinski* found a right to counsel under section 13 even though the Indiana Supreme Court declined to find such a right under the self-incrimination clause of section 14 in almost identical factual circumstances just four years before.<sup>379</sup>

Malinski was prosecuted for the kidnapping, sexual assault and murder of a co-worker.<sup>380</sup> Substantial physical evidence linked Malinski to the crime and he was arrested and questioned after *Miranda* warnings were administered.<sup>381</sup> While he was being questioned, family members hired an attorney to represent Malinski. The attorney went to the jail and asked to see Malinski.<sup>382</sup> Because Malinski had not requested counsel, however, the attorney was not permitted to see Malinski.<sup>383</sup> Malinski confessed and that confession was used to convict him at trial.<sup>384</sup>

The court began its discussion by noting that the Fifth and Fourteenth Amendments convey to a person being held for questioning no federal right to be informed that an attorney is present to represent the person.<sup>385</sup> The court also recognized that in 1999 it had held, in *Ajabu v. State*, that a suspect being questioned in very similar circumstances had no right under the self-incrimination clause of article I, section 14, to be informed of an attorney who had been hired to represent him.<sup>386</sup> Following federal precedent, *Ajabu* held that

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376. *Id.* at 170.

377. 794 N.E.2d 1071 (Ind. 2003).

378. See also Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 578 (1989). Compare *Webb v. Baird*, 6 Ind. 13 (1854), with *Gideon v. Wainwright*, 372 U.S. 335 (1963).

379. Compare *Malinski*, 794 N.E.2d at 1079, with *Ajabu v. State*, 693 N.E.2d 921, 933-35 (Ind. 1998).

380. *Malinski*, 794 N.E.2d at 1073-74.

381. *Id.* at 1074-76.

382. *Id.* at 1075.

383. *Id.*

384. *Id.* at 1074-75.

385. *Id.* at 1076-77 (citing, e.g., *Moran v. Burbine*, 475 U.S. 412 (1986)).

386. 693 N.E.2d 921, 933-35 (Ind. 1998). *Ajabu*'s attorney was not physically present at the jail, but only telephoned. Malinski's attorney, on the other hand, was physically present at the jail.



the privilege against self-incrimination was not violated when a suspect being questioned was not informed that an attorney had told police he had been retained to represent the suspect.<sup>387</sup> The *Ajabu* court held that withholding that information did not make the suspect's confession involuntary, and article I, section 14 prohibits only involuntary confessions.<sup>388</sup>

The court began its analysis of Malinski's section 13 claim by describing Indiana's right to counsel as "expansive,"<sup>389</sup> affording "Indiana's citizens greater protection than its federal counterpart."<sup>390</sup> Following its recent practice in individual rights cases, the court also reviewed case law from other jurisdictions,<sup>391</sup> a number of which "recognized an affirmative duty to inform" a suspect of an attorney present at the jail to represent him.<sup>392</sup> The court then held that "an incarcerated suspect has a right under section 13 to be informed that an attorney hired by his family to represent him is present at the [police] station and wishes to speak to him."<sup>393</sup> The court reasoned that, although such a right is not necessary to preserve the suspect's rights against self-incrimination, it is necessary to assure that the suspect's choice not to request counsel is knowing and intelligent.<sup>394</sup>

The court adopted a "totality of circumstances" test to determine whether to exclude any confession given by a suspect who was not informed that a lawyer was present to represent him or her, again looking to other states' examples of how to address the question.<sup>395</sup> The court found this approach consistent with other rules for evaluating waivers, and it directed that the circumstances to be evaluated include, but are not limited to, the extent to which the police knew of the attorney's presence, the suspect's conduct, the nature of the attorney's request, and the suspect's relationship with the attorney.<sup>396</sup> Under this test, the court concluded that Malinski's confession was knowing and voluntary, and its admission did not require reversal of the conviction.<sup>397</sup>

### F. Juries

In the most recent year, the court made two decisions regarding juries. In *Holden v. State*,<sup>398</sup> the court resolved a recent controversy over the meaning of

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387. *Id.* at 934-35.

388. *Id.* at 933.

389. *Malinski*, 794 N.E.2d at 1079.

390. *Id.* at 1078.

391. *Id.* at 1077-79.

392. *Id.* at 1077.

393. *Id.* at 1079.

394. *Id.*

395. *Id.* at 1079-80.

396. *Id.*

397. *Id.* at 1080.

398. 788 N.E.2d 1253 (Ind. 2003), *reh. granted*, 799 N.E.2d 538 (Ind. 2003) (summarily

article I, section 19's statement that "[i]n all criminal cases whatever, the jury shall have the right to determine the law and the facts."<sup>399</sup> Earlier cases had held that this provision does not permit the jury to ignore applicable law and that the jury may be instructed that the judge's instructions are the best source of determining what the law is.<sup>400</sup> (In practice, of course, a jury's decision to acquit even if a defendant has been proved guilty beyond a reasonable doubt is unreviewable).<sup>401</sup>

These principles were called into question by Justice Rucker's 1999 law review article asserting that the case law had turned section 19 into "a nullity."<sup>402</sup> Based on the history of the provision and the anti-government, Jacksonian origin of Indiana's 1851 Constitution, Justice Rucker's article concluded that the framers intended the provision to mean that jurors were not required to apply the law strictly when their consciences dictated otherwise. Allowing juries to acquit when their consciences required it was another check on governmental authority and vindictive prosecutions.<sup>403</sup> "[A]n instruction telling the jury that the constitution intentionally allows them latitude to 'refuse to enforce the law's harshness when justice so requires' would be consistent with the intent of the framers and give life to what is now a dead letter provision."<sup>404</sup>

In *Holden*, however, the court rejected just the kind of instruction suggested by Justice Rucker's article, and it did so in a unanimous opinion written by Justice Rucker.<sup>405</sup> The opinion briefly reviewed the history of jury nullification, defined as the jury's "right to return a verdict of not guilty despite the law and the evidence where a strict application of the law would result in injustice and violate the moral conscience of the community."<sup>406</sup> The court stated that

early case authority in this state stood for the proposition that the jury's law determining function meant that the jury could "disregard" the instructions of the trial court. However, on closer examination it appears that the right to disregard the trial court's instructions has never been equated as a right to disregard "the law."<sup>407</sup>

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affirming Indiana Court of Appeals as to all issues not addressed in earlier opinion).

399. IND. CONST. art. I, § 19.

400. *E.g.*, *Bivins v. State*, 642 N.E.2d 928, 946 (Ind. 1994).

401. *Fong Foo v. United States*, 369 U.S. 141 (1962).

402. Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 VAL. U. L. REV. 449, 470 (1999).

403. *Id.* at 477.

404. *Id.* at 481.

405. 788 N.E.2d at 1253-55.

406. *Id.* at 1254 (citing JEFFREY ABRAMSON, *WE, THE JURY* 57 (1994)). Jury nullification generally does not encompass a guilty verdict even when the evidence does not justify it. The system includes many safeguards against such conduct, including the trial court's ability to reject such a verdict and an appellate court's responsibility to determine the sufficiency of evidence supporting a conviction.

407. *Id.* Under the liberal provisions for admission to the bar contained in the original 1851



That is, the jury is permitted to construe the law in a manner different than the judge, but not to ignore it altogether.<sup>408</sup> The court concluded:

Although there may be some value in instructing Indiana jurors that they have a right to “refuse to enforce the law’s harshness when justice so requires,” the source of that right cannot be found in Article I, Section 19 of the Indiana Constitution. This Court’s latest pronouncement on the subject is correct: “[I]t is improper for a court to instruct a jury that they have a right to disregard the law. Notwithstanding Article I, Section 19 of the Indiana Constitution, a jury has no more right to ignore the law than it has to ignore the facts of a case.”<sup>409</sup>

The court affirmed the trial court’s decision not to permit the instruction suggested by Justice Rucker’s article.<sup>410</sup>

The court’s other jury decision was *Sims v. United States Fidelity & Guaranty Co.*,<sup>411</sup> in which the plaintiff argued that his claim that a worker’s compensation insurer had acted in bad faith in denying him compensation and medical treatment must be tried to a jury. The worker’s compensation statute required the claim to be asserted administratively before the Worker’s Compensation Board.<sup>412</sup> The statutory requirement to seek an administrative remedy was enacted after the court’s decision in *Stump v. Commercial Union Insurance Co.*,<sup>413</sup> which held that claims that a worker’s compensation carrier had committed an independent tort could be asserted in court rather than before the Worker’s Compensation Board. The court held that the statutory amendment after *Stump* “likely represented a legislative response” to *Stump* and meant that *Stump* no longer controlled whether bad faith claims against worker’s compensation insurers could be taken directly to court.<sup>414</sup> The court of appeals had ruled that this statutory requirement violated the “open courts” provision of article I, section 12.<sup>415</sup>

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Constitution, it was entirely possible that the trial judge would be little more learned in the law than the jurors themselves. Originally, the 1851 Constitution stated that “[e]very person of good moral character, being a voter, shall be entitled to admission to practice law in all Courts of Justice.” Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 2073 (art. VII, § 21) (Ind. Hist. Soc. Reprint 1935).

408. *Holden*, 788 N.E.2d at 1254. This line of reasoning raises significant issues under the Due Process Clause. If two juries are allowed to apply the law differently in two identical factual circumstances, the defendants are not being judged consistently, a potential due process violation. Rucker, *supra* note 402, at 472.

409. *Holden*, 788 N.E.2d at 1255 (quoting *Bivins v. State*, 642 N.E.2d 928, 946 (Ind. 1994)).

410. *Id.*

411. 782 N.E.2d 345 (Ind. 2003).

412. IND. CODE § 22-3-4-12.1 (2003).

413. 601 N.E.2d 327 (Ind. 1992).

414. *Sims*, 782 N.E.2d at 350.

415. *Sims v. U.S. Fid. & Guar. Co.*, 730 N.E.2d 232, 235 (Ind. Ct. App. 2000) (quoting IND.

The Indiana Supreme Court's majority first found that the statutory requirement that the claim be presented to the Worker's Compensation Board did not violate the Open Courts Clause.<sup>416</sup> The court ruled that because Sims could present his claim for judicial review after determination by the Worker's Compensation Board, he was not entirely denied access to the courts and the statutory scheme therefore did not violate article I, section 12.<sup>417</sup> Citing *Martin v. Richey*,<sup>418</sup> the court stated that the Open Courts Clause is violated only when a statute makes it impossible for a claimant to present his claim to a court, not when presentation of the claim is first made contingent on exhausting an administrative procedure.<sup>419</sup>

The court then addressed Sims's claim that the statute violated his right to trial by jury.<sup>420</sup> Article 1, section 20, states that "[i]n all civil cases, the right of trial by jury shall remain inviolate," and the clause preserves the right to trial by jury of all claims triable by jury at common law.<sup>421</sup> The court held that, although most bad faith claims were triable by jury at common law, a claim against a worker's compensation insurer existed only because of the statutory creation of the worker's compensation system.<sup>422</sup> Quoting Judge Baker's court of appeals' dissent, the court noted that "but for the [Worker's Compensation] Act there would be no insurance carrier against whom to bring the action."<sup>423</sup> The bad faith claim, in other words, is part of a statutory proceeding and not a "civil case" under section 20.<sup>424</sup>

The worker's compensation scheme removed workplace injuries from "the harshness of the common law" and placed them in a system in which the worker trades limited compensation for a near-strict liability system guaranteeing compensation for workplace injuries.<sup>425</sup> The worker's compensation statutes abolished the common law relationship between employers and employees and with it, "all attendant rights."<sup>426</sup> Creation of a new legal relationship between employers and employees is within the legislature's province, and requiring administrative presentation of claims against worker's compensation insurers

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CONST. art. I, § 12) ("All courts shall be open; and every person; for injury done to him in his person, property, or reputation, shall have remedy by due course of law.").

416. *Sims*, 782 N.E.2d at 349-51.

417. *Id.* at 351.

418. *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999).

419. *Sims*, 782 N.E.2d at 350-51.

420. *Id.* at 351-52.

421. *Id.* at 351 (citing, e.g., *Wright v. Fultz*, 38 N.E. 175 (Ind. 1894) (quoting IND. CONST. art. I, § 20)).

422. *Id.* at 351-52.

423. *Id.* at 351 (quoting *Sims v. U.S. Fid. & Guar. Co.*, 730 N.E.2d 232, 237-38 (Ind. Ct. App. 2000) (Baker, J., dissenting)).

424. *Id.* at 352.

425. *Id.* at 351-52.

426. *Id.* at 352.



therefore does not eviscerate any common law right.<sup>427</sup>

The court also concluded that the statute confining Sims's claim to the Worker's Compensation Board did not violate the Equal Privileges and Immunities Clause.<sup>428</sup> Sims argued that the treatment of a classification consisting of worker's compensation insurers was unconstitutionally different from its treatment of a classification consisting of all other insurers.<sup>429</sup> The court rejected this claim on the basis that the policy underlying the worker's compensation system justified this different treatment.<sup>430</sup> The sure and expeditious remedy provided in the worker's compensation system, as compared to the doubtful and prolonged process of litigation, justified the different treatment.<sup>431</sup> Moreover, the worker's compensation system treats insurers differently in many ways than the law treats other insurance companies, further illustrating that there are inherent differences between the two groups that support different treatment.<sup>432</sup>

Justice Dickson dissented on the open courts claim.<sup>433</sup> His view was that the amendment requiring presentation of the claim to the Worker's Compensation Board did not abolish the common law cause of action against the worker's compensation insurer recognized in *Stump*, and that the statutory requirement that the claim be presented administratively was therefore unconstitutional.<sup>434</sup> Because the cause of action remained intact, in Justice Dickson's view the legislature could not require it to be presented to an administrative adjudicator rather than a jury.<sup>435</sup> The statute therefore violated section 12 and, in Justice Dickson's view, Sims was entitled to a jury trial under section 20.<sup>436</sup>

### G. Particular Services

In *Cheatham v. Poole*,<sup>437</sup> a case about punitive damages, the Indiana Supreme Court looked at the Particular Services Clause of article I, section 21. The case addressed the statute requiring that seventy-five percent of all punitive damages be paid to the state's Victim Compensation Fund, with only twenty-five percent going to the plaintiff.<sup>438</sup> In this case, Cheatham won a \$100,000 punitive damage award on top of an identical amount of compensatory damages.<sup>439</sup>

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427. *Id.*

428. *Id.* at 353-54.

429. *Id.* at 353.

430. *Id.* at 353-54.

431. *Id.*

432. *Id.* at 354.

433. *Id.* at 354-55.

434. *Id.* at 354.

435. *Id.*

436. *Id.* at 355.

437. 789 N.E.2d 467 (Ind. 2003).

438. IND. CODE § 34-51-3-6 (1999).

439. *Cheatham*, 789 N.E.2d at 470.

In addressing the claim that the statute worked a taking on Cheatham, the court, in a 4-1 opinion by Justice Boehm, first probed the nature of punitive damages under Indiana law.<sup>440</sup> Punitive damages are designed to punish and deter wrongful activity, and under federal law states have great freedom to limit punitive damages.<sup>441</sup> Punitive damages are a creature of the common law, which may be altered or abolished by the legislature.<sup>442</sup> Because of the nature of punitive damages, no plaintiff has a right to receive them.<sup>443</sup>

Like the Takings Clause of the Fifth Amendment, article I, section 21 provides for damages only when "property" is taken.<sup>444</sup> While a cause of action may itself be property, no Indiana plaintiff has a right to punitive damages.<sup>445</sup> Punitive damages therefore are not "property" for section 21 purposes, and the statute limiting the percentage of punitive damages a plaintiff may retain does not accomplish a taking under section 21.<sup>446</sup> For the same reason, the court rejected Cheatham's claim that the statute violated the requirement of uniform and equal taxation in article X, section 1: that provision only applies to property, and the punitive damage award was not property.<sup>447</sup>

The court next addressed Cheatham's claim that the statute unconstitutionally demanded her attorney's particular services.<sup>448</sup> Unlike the federal Takings Clause, section 21 applies not only to property, but also states that "[n]o person's particular services shall be demanded, without just compensation."<sup>449</sup> Cheatham claimed that the statute demanded her attorney's particular services without compensation since there was no provision to compensate the attorney for the work he did to obtain the seventy-five percent of the punitive damages going to the Victim Compensation Fund.<sup>450</sup>

The court agreed that the services of the attorney constituted "particular services" under section 21 because the services were "(1) historically compensated, and (2) something required of a party as an individual, as opposed to something required generally of all citizens."<sup>451</sup> But Cheatham's claim failed because the services were not "demanded."<sup>452</sup>

Cheatham engaged her attorney and the attorney agreed to represent her, all with no state intervention of any kind. In order for there to be a state

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440. *Id.* at 471-72.

441. *Id.* at 471 (citing, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996)).

442. *Id.*

443. *Id.* at 472.

444. *Id.* at 473.

445. *Id.*

446. *Id.*

447. *Id.* at 476.

448. *Id.* at 476-77.

449. IND. CONST. art. I, § 21.

450. *Cheatham*, 789 N.E.2d at 476.

451. *Id.* (quoting *Bayh v. Sonnenburg*, 573 N.E.2d 398, 415-16 (Ind. 1991)).

452. *Id.*



demand on a person's particular services, there must be the threatened use of physical force or legal process that leads that person to believe that they have no choice but to submit to the will of the State.<sup>453</sup>

Because the State did not require the lawyer to provide the service, there was no demand and the services are not compensable.<sup>454</sup>

Justice Dickson dissented based on the method by which the statute transferred the three-quarters' share to the Victim Compensation Fund.<sup>455</sup> The law provided that when judgment was entered, the punitive damages are paid to the court clerk, who is required to pay the appropriate share to the fund.<sup>456</sup> Justice Dickson reasoned that when judgment was entered, the entire amount became the plaintiff's property.<sup>457</sup> A portion of that property was taken when the clerk transferred it to the Victim Compensation Fund, and that act constituted an uncompensated taking.<sup>458</sup>

### CONCLUSION

In the most recent year, Indiana courts' approach to the Indiana Constitution generally followed recent practice. The court displayed some boldness in its actions under the structural constitution, but generally interpreted the rights constitution no more broadly than cognate federal provisions. On the analytical side, the Indiana Supreme Court continued its recent trend of looking frequently to other state courts' construction of similar constitutional provisions as a guidepost.<sup>459</sup>

*Peterson v. Borst* characterized the Indiana Supreme Court's approach under the structural constitution, as the court acted in a bold but nonpartisan manner to settle a key public dispute over redistricting. In *Cittadine*, the court reached out to reaffirm the public standing doctrine, ending speculation that the doctrine had fallen in *Pence v. State* and announcing that the courts remain open to vindicate public rights. In *Kimsey*, the court broke no analytical ground but again spoke unflinchingly on a public issue, invalidating a statute under the special law provisions of the Indiana Constitution for the first time in nearly three decades. Having required statewide property reassessment under new standards in *Town of St. John* in 1998, the court took a flexible approach in two cases under the Property Tax Uniformity Clause, allowing state officials to approach issues of tax policy in a practical manner so long as the underlying assessment apparatus projected uniformity.

In several cases, the court applied the rights constitution in a manner

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453. *Id.* (citing *Bayh*, 573 N.E.2d at 417).

454. *Id.*

455. *Id.* at 477-78.

456. IND. CODE § 34-51-3-6 (2003).

457. *Cheatham*, 789 N.E.2d at 478.

458. *Id.*

459. *E.g.*, *Embry v. O'Bannon*, 798 N.E.2d 157, 165-66 (Ind. 2003); *Malinski v. State*, 794 N.E.2d 1071, 1077-80 (Ind. 2003).

consistent with cognate federal rights. In cases about zoning,<sup>460</sup> the statute of repose,<sup>461</sup> domestic partner rights,<sup>462</sup> the sex offender registry,<sup>463</sup> public school teachers in religious schools,<sup>464</sup> jury trial rights,<sup>465</sup> and punitive damages,<sup>466</sup> the Indiana Supreme Court and Indiana Court of Appeals applied Indiana constitutional provisions in a manner leading to outcomes identical to federal court applications of the U.S. Constitution. The Indiana Supreme Court interpreted the Indiana Constitution in a more expansive manner in just two cases. One addressed right to counsel, where Indiana has a long history of more expansive rights.<sup>467</sup> In the other case, Indiana joined a majority of states that have addressed the issue by determining that the state constitution requires broader Medicaid coverage for abortions than the federal constitution mandates.<sup>468</sup> Future decisions by Indiana courts on claims under the Indiana Constitution will determine whether this pattern continues.

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460. *Dvorak v. City of Bloomington*, 796 N.E.2d 236, 239-40 (Ind. 2003).

461. *AlliedSignal v. Ott*, 785 N.E.2d 1068, 1076-77 (Ind. 2003).

462. *Cornell v. Hamilton*, 791 N.E.2d 214, 221 (Ind. Ct. App. 2003).

463. *Doe v. O'Connor*, 790 N.E.2d 985, 988-89 (Ind. 2003).

464. *Embry v. O'Bannon*, 798 N.E.2d 157, 164-67 (Ind. 2003).

465. *Sims v. U.S. Fid. & Guar. Co.*, 782 N.E.2d 345, 351-52 (Ind. 2003).

466. *Cheatham v. Poole*, 789 N.E.2d 467, 473-76 (Ind. 2003).

467. *Malinski v. State*, 794 N.E.2d 1071, 1077-79 (Ind. 2003).

468. *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 259-60 (Ind. 2003).



# RECENT DEVELOPMENTS IN INDIANA CONTRACT LAW

TIMOTHY A. OGDEN\*

## INTRODUCTION

Indiana courts addressed a number of significant contract law issues during the review period, both in the common-law context and in the context of the sale of goods under Article 2 of the Uniform Commercial Code. Several of those decisions addressed questions of first impression in Indiana, while others provided useful reminders of important issues to Indiana attorneys.

### I. THE DISCOVERY RULE AND THE STATUTE OF LIMITATIONS IN CONTRACT ACTIONS

*Meisenhelder v. Zipp Express, Inc.*<sup>1</sup> involved the question of whether the discovery rule applied to the statute of limitations in a contract action. In that case, the plaintiff entered into an employment contract on September 1, 1986, and he did not dispute that any claim he had for breach of contract had to be initiated "within ten years after the cause of action accrued."<sup>2</sup> He disagreed with his employer, however, about when the cause of action accrued and, thus, when the statute of limitations began to run.

The Indiana Court of Appeals began its analysis by carefully reviewing *Habig v. Bruning*.<sup>3</sup> It noted that it was not entirely clear in *Habig* whether the court was treating the claims there (for breach of contract, breach of warranty of habitability, and breach of warranty of workmanship) as contract claims or tort claims.<sup>4</sup> In reaching its conclusion that the discovery rule applied to the statute of limitations governing those claims,<sup>5</sup> the court in *Habig* relied on three cases that involved torts,<sup>6</sup> suggesting that the court viewed the case before it as a tort

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1. 788 N.E.2d 924 (Ind. Ct. App. 2003).

2. *Meisenhelder*, 788 N.E.2d at 927. The relevant statute of limitations provides as follows: "An action upon contracts in writing . . . must be commenced within ten (10) years after the cause of action accrues." IND. CODE § 34-11-2-11 (1998).

3. 613 N.E.2d 61 (Ind. Ct. App. 1993).

4. *Meisenhelder*, 788 N.E.2d at 929.

5. The applicable statute of limitations in *Habig* covered "(1) accounts and contracts not in writing, (2) use, rents, and profits of real property, (3) for injuries to property other than personal property, and (4) relief against frauds." *Id.* (citing former IND. CODE § 34-1-2-1). This code section is now codified at Indiana Code section 34-11-2-7 (1998).

6. See *Wehling v. Citizens Nat'l Bank*, 586 N.E.2d 840 (Ind. 1992); *Burks v. Rushmore*, 534 N.E.2d 1101 (Ind. 1989); *Barnes v. A.H. Robins Co., Inc.*, 476 N.E.2d 84 (Ind. 1985). The

claim.<sup>7</sup> Arguably then, its holding regarding the applicability of the discovery rule could have been "limited to tort claims for injuries to real property."<sup>8</sup> But the court in *Habig* went on to say that "[i]t would be wholly incongruous to interpret IC 34-1-2-1 as requiring the discovery rule in tort cases but not in other cases covered by the particular statute of limitations."<sup>9</sup>

The court in *Meisenhelder* extended this line of thought to the statute of limitations at issue there.

If it was incongruous to apply the discovery rule only to tort claims under I.C. § 34-1-2-1, now I.C. § 34-11-2-7, it would be just as incongruous to apply the discovery rule to tort claims formerly covered by I.C. § 34-1-2-2(1), but not the other claims . . . covered by . . . the statute of limitations at issue before us today.<sup>10</sup>

The court went on to cite *New Welton Homes v. Eckman*<sup>11</sup> and concluded: "the discovery rule is applicable to actions for breach of a written contract under I.C. § 34-11-2-11, and . . . Meisenhelder's cause of action accrued when he knew, or in the exercise of ordinary diligence, could have discovered, that his employment contract had been breached."<sup>12</sup> The court found, however, that the plaintiff knew about the breach in 1987, and thus his lawsuit was still time barred.<sup>13</sup>

## II. VIOLATION OF CONTRACTED-FOR ARBITRATION CLAUSES: STAY OF PROCEEDINGS OR DISMISSAL

*Indiana CPA Society, Inc. v. GoMembers, Inc.*<sup>14</sup> presented an issue of first

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relevant statute of limitations in these cases was the former Indiana Code section 34-1-2-2. *Meisenhelder*, 788 N.E.2d at 928. The limitations periods contained in that section of the code are now codified at Indiana Code sections 34-11-2-4 to -6, -8 to -9, -11 (1998). *Meisenhelder*, 788 N.E.2d at 928 n.4.

7. *Meisenhelder*, 788 N.E.2d at 929.

8. *Id.*

9. *Habig v. Bruning*, 613 N.E.2d 61, 64 (Ind. Ct. App. 1993) (citation omitted).

10. *Meisenhelder*, 788 N.E.2d at 929.

11. 786 N.E.2d 1172 (Ind. Ct. App. 2003), *vacated by* 2003 Ind. LEXIS 742 (Ind. Sept. 4, 2003). The court in *New Welton* stated,

Since we have applied the discovery rule to breach of contract cases where the statute of limitations operates to foreclose untimely claims, then it follows that the discovery rule should also be applied to breach of contract cases where the parties have shortened by contract the time within which suit may be brought and the time of breach is not fixed or readily ascertainable.

*Id.* at 1177. It will be interesting to see whether the Indiana Supreme Court upholds this decision.

12. *Meisenhelder*, 788 N.E.2d at 930. It is not clear whether the lawsuit was filed in 1999 or 2000, but in any case, *Meisenhelder* missed the ten-year deadline. *Id.* at 926, 931.

13. *Id.* at 930-31.

14. 777 N.E.2d 747 (Ind. Ct. App. 2002).



impression in Indiana in the arbitration context: whether, in a situation where parties have contracted to arbitrate their disputes, and despite that agreement, one of the parties initiates a lawsuit, the court should dismiss the case or stay the proceedings pending the outcome of the arbitration. The Indiana CPA Society ("Society") entered into a contract requiring GoMembers to perform some work on Society's web site. The contract contained a clause requiring disputes to be submitted to arbitration,<sup>15</sup> but when a problem arose, Society filed a breach of contract claim in Marion County Superior Court rather than seeking arbitration. GoMembers filed a motion to dismiss, which the trial court granted.

The court of appeals analyzed cases from other jurisdictions to assist it in deciding this issue. For example, in *Shribman v. Miller*<sup>16</sup> the court concluded that if the clause in the contract that required arbitration was phrased as a condition precedent to a lawsuit, then it would be appropriate for a court to dismiss an action brought before the parties had arbitrated the dispute.<sup>17</sup> However, if the contractual language did not make arbitration a condition precedent to a claim in court, then it would be appropriate for the court to stay the proceedings pending the outcome of the arbitration.<sup>18</sup>

Other jurisdictions have held that where a plaintiff ignored the arbitration clause in the contract and proceeded directly to the courts, the defendant could seek summary judgment (on the theory that the plaintiff failed to exhaust his or her administrative remedies), or the defendant could seek to stay the proceedings pending arbitration.<sup>19</sup> One court also suggested that if the premature lawsuit were dismissed without prejudice, the practical effect would be the same as staying the proceedings, and apparently either approach would be acceptable.<sup>20</sup>

The Indiana Court of Appeals recognized that when faced with these factual circumstances, some courts in Indiana have stayed the proceedings, and others have dismissed the lawsuits; however, the courts have not clarified why their chosen actions were appropriate.<sup>21</sup> After considering the numerous alternatives, the court of appeals concluded that the best course of action was to allow the courts to "exercise their discretion to either stay or dismiss litigation based on the nature of the contested issues that should first be submitted to arbitration."<sup>22</sup> It

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15. "Disputes under this Agreement shall be submitted to binding arbitration in accordance with the procedures of the American Arbitration Association." *Id.* at 749 (quoting Appellant's App. at 12).

16. 158 A.2d 432 (N.J. Super. Ct. Ch. Div. 1960).

17. *Ind. CPA Soc'y*, 777 N.E.2d at 751 (citing *Shribman*, 158 A.2d at 438).

18. *Id.* The court in *Shribman* stated that arbitration would be a condition precedent to bringing a lawsuit in court if the clause in the contract stated that "the parties may not resort to the courts for the resolution of [their] disputes, unless and until" the disputes have been submitted to arbitration and a determination has been made. *Id.* (quoting *Shribman*, 158 A.2d at 438).

19. *Id.* (citing *Charles J. Rounds Co. v. Joint Council of Teamsters*, 484 P.2d 1397, 1404 (Cal. 1971)).

20. *Id.* at 752 (citing *Pine Gravel, Inc. v. Cianchette*, 514 A.2d 1282 (N.H. 1986)).

21. *Id.* (citations omitted).

22. *Id.*

added that in reaching their conclusions, courts might consider the following factors: whether the court would need to intervene to compel discovery; whether the court would be asked to enforce the arbitration award; whether the entire dispute would be submitted to arbitration; which state's law would control the parties' disputes; and where the parties and the evidence were located.<sup>23</sup>

Here, it did not appear that the court would have to oversee the arbitration proceeding, and the contractual choice of law provision stated that Illinois law would control disputes between the parties. It was, therefore, not an abuse of discretion for the trial court to dismiss the lawsuit.<sup>24</sup>

### III. A QUESTION OF PRIVACY

*Young v. Tri-etch, Inc.*<sup>25</sup> involved the question of who was party to a contract and thus was subject to its stipulated statute of limitations. Tri-etch sold and installed a security alarm system at Muncie Liquors, and Tri-etch and MLS (the owner of Muncie Liquors) entered a written contract whereby Tri-etch would monitor that system. Apparently, if the alarm had not been set within a certain length of time following the store's regular closing time, Tri-etch would call the store, and if nobody answered, Tri-etch would contact the general manager, as well as the police.<sup>26</sup> The contract included a clause that provided a one-year statute of limitations for bringing a claim.

In August 1997, Michael Young, a store employee, was working the late shift at the store. Shortly before midnight (and before Young set the alarm), a man robbed the store, kidnapped Young, and took him to a park where he beat him and tied him to a tree. Young was found, still alive, at approximately 6:00 a.m., but he later died of his injuries. His "estate presented some evidence that had Young been found earlier, he might have survived."<sup>27</sup> Tri-etch, however, had not contacted the store or the general manager until approximately 3:15 a.m. regarding the fact that the alarm had not been set. Consequently, Young's estate filed a wrongful death claim against Tri-etch in August 1999, and Tri-etch filed a motion for summary judgment, arguing that the one-year statute of limitations contained in the contract barred the action. The trial court granted the motion, finding that the time for bringing the wrongful death claim was governed by the limitation period established in the contract, and the court of appeals affirmed.<sup>28</sup>

Upon transfer, the Indiana Supreme Court reversed the judgment. The supreme court stated that the lower courts had erroneously relied upon *Orkin*

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23. *Id.*

24. *Id.*

25. 790 N.E.2d 456 (Ind. 2003).

26. This service was not included in the written contract, but evidence existed that it was a part of the agreement. The regular closing time was midnight, and generally Tri-etch contacted the store or, if no one answered, the general manager by 12:30 a.m. if the alarm had not been set. *Id.* at 457.

27. *Id.*

28. *Id.*



*Exterminating Co. v. Walters*,<sup>29</sup> a tort case between two parties who, by entering into the contract giving rise to the suit, had agreed to the contractual provision limiting liability. Unlike *Orkin*, the case at issue was a tort lawsuit between one party to the relevant contract and another person who “never agreed to the terms of the contract.”<sup>30</sup> The court looked to a case from Illinois<sup>31</sup> and a case from Tennessee<sup>32</sup> for guidance, and then reached the following conclusion: “Since Young was not a party to the contract, and thus never consented to the terms of the contract, the contract simply does not impose any obligations or limitations on him.”<sup>33</sup> Thus the one-year statute of limitations established by the contract between Tri-etch and MLS did not bar the wrongful death claim by Young’s estate.

#### IV. COVENANTS NOT TO COMPETE

Several important cases decided during the review period dealt with covenants not to compete. In *Robert’s Hair Designers, Inc. v. Pearson*,<sup>34</sup> hair stylists Pearson and Walsh had signed non-compete agreements which provided, among other things, that upon leaving Robert’s Hair Designers (“Robert’s”), the hair stylists would not perform the same or similar services as they had provided to Robert’s for any competitor within an eight-mile radius for a period of one year. Moreover, the agreement included a provision precluding the hair stylists from soliciting clients from Robert’s.<sup>35</sup>

After becoming dissatisfied with their employment at Robert’s, Pearson and Walsh arranged for new employment as hair stylists at Design Lines Hair Salon (“Design Lines”), which was located approximately one-half mile from Robert’s. Before they left Robert’s, they contacted customers to tell them they would be leaving and that they would be pleased if the customers would follow them to Design Lines.<sup>36</sup> They left Robert’s on July 20, 2002, and began working at Design Lines the following week. Both Pearson and Walsh had customers scheduled for their first day of work at Design Lines, and Walsh stated that most of her customers there had also been her clients at Robert’s.<sup>37</sup> Robert’s sought a preliminary injunction,<sup>38</sup> but the trial court denied that request following a

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29. 466 N.E.2d 55 (Ind. Ct. App. 1984), *abrogated by* Mitchell v. Mitchell, 695 N.E.2d 920, 922 (Ind. 1998).

30. *Young*, 790 N.E.2d at 458.

31. *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 493 N.E.2d 1022 (Ill. 1986).

32. *Lovell v. Sonitrol of Chattanooga, Inc.*, 674 S.W.2d 728 (Tenn. Ct. App. 1983).

33. *Young*, 790 N.E.2d at 459.

34. 780 N.E.2d 858 (Ind. Ct. App. 2002).

35. *Id.* at 861.

36. *Id.* at 862.

37. *Id.*

38. In order to obtain a preliminary injunction, the movant must satisfy each of the following requirements: 1) the movant does not have an adequate remedy at law and thus will suffer irreparable harm; 2) the movant has a reasonable likelihood of succeeding at trial; 3) the potential

hearing.<sup>39</sup>

On appeal, Pearson and Walsh did not dispute the enforceability of the agreement. They did not argue that the covenant not to compete was unreasonable as to time, geography, or the scope of the prohibited activity, and they did not dispute that there was a reasonable likelihood that Robert's would prevail at trial. The focus of the appeal was whether a preliminary injunction was appropriate. Robert's argued that the trial court erred when it concluded that Robert's failed to show irreparable harm when it decided that the potential harm to Pearson and Walsh outweighed the threatened harm to Robert's and when it determined that granting the injunction would do a disservice to the public interest.<sup>40</sup>

The trial court found that Robert's failed "to demonstrate any economic loss or loss of goodwill" as a result of the breaches,<sup>41</sup> and it appears that the primary basis for its conclusion was that Robert's experienced an increase in business revenues in the week following Pearson and Walsh's departure. The court of appeals, however, disagreed with the lower court. Pearson and Walsh's actions were a direct cause of the loss of customers that Robert's experienced. "Simply looking at the Salon's increase in revenues after Pearson and Walsh left is not sufficient. Had Pearson and Walsh not left, . . . and not taken customers that they served, Robert's Salon's increase in revenues would have been even greater."<sup>42</sup> Moreover, the loss of goodwill that Robert's experienced because of the two hair stylists' current and future violations of the agreement justified finding that it would suffer irreparable harm.<sup>43</sup>

In short, "[t]his is exactly the type of breach for which injunctive relief is particularly well suited. Without an injunction, [Robert's] would be forced to amend [its] complaint repeatedly to include every successive violation (possibly every day that [Design Lines] remains open) after filing [its] original complaint."<sup>44</sup> If post-trial damages are not sufficient to satisfy an economic injury, then the party suffering the damages is entitled to receive injunctive relief.<sup>45</sup> The court of appeals consequently reversed the trial court's decision.<sup>46</sup>

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injury to the movant outweighs potential harm to the non-movant that would result from granting the motion; and 4) granting the motion would not disserve the public interest. *Id.* at 863 (citation omitted).

39. *Id.* at 864.

40. *Id.*

41. *Id.* at 863.

42. *Id.* at 865.

43. *Id.*

44. *Id.* at 866 (quoting *Washel v. Bryant*, 770 N.E.2d 902, 907 (Ind. Ct. App. 2002)).

45. *Id.*

46. Regarding the third and fourth requirements that the movant must establish in order to be entitled to injunctive relief (*see supra* note 38), the court of appeals stated that the trial court's findings failed to address how granting the request for an injunction would harm Pearson and Walsh. *Id.* at 868. Moreover, it found no evidence to support the lower court's determination that granting the requested relief would disserve the public interest. *Id.* at 869.



*Pathfinder Communications Corp. v. Macy*<sup>47</sup> also involved a non-compete agreement, this time entered into by Dave Macy, a radio personality, with his employer, Pathfinder Communications ("WOWO"). WOWO hired Macy to bring his "Macy in the Morning" show format, a talk radio program known for its conservative, opinionated commentary, to its morning radio show. The covenant not to compete stated that for twelve months following his termination of employment with WOWO, Macy would "not engage in activities or be employed as an on-air personality, either directly or indirectly" with certain radio stations, including WGL.<sup>48</sup>

Approximately four years later, WOWO decided to change the format of the show, focusing more on news and local events and avoiding discussion of controversial issues. WOWO also changed the name of the show to "Fort Wayne Morning News with Dave Macy."<sup>49</sup> Subsequently, Macy's employment with WOWO ended following Macy's falsification of program logs. Two months after that, Macy joined WGL and brought the former "Macy in the Morning" show format to his new employer.<sup>50</sup> In the ensuing lawsuit, the trial court concluded that WOWO had no protectible interest in the "Macy in the Morning" program or in Dave Macy and that the non-compete agreement was not enforceable because the scope of the prohibited activities was overbroad. Consequently, it denied WOWO's request for a preliminary injunction.<sup>51</sup>

WOWO argued on appeal that it did have a protectible "interest in Dave Macy, the on-air personality WOWO cultivated . . . regardless of the content of Macy's radio show . . ."<sup>52</sup> The court noted that it did not find any case law in Indiana that addressed this issue, so it looked to the law of other jurisdictions for help. Relying on decisions from Virginia, Florida, and Alabama,<sup>53</sup> the court concluded that WOWO did, in fact, maintain a protectible interest in its former on-air personality:

WOWO invested substantial resources in Macy to promote him in the Ft. Wayne market. While on the air at WOWO, Macy acted as WOWO's representative to its listening audience. Also, Macy obtained employment at WGL, a direct competitor of WOWO with a similar format, and he is hosting the morning drive time slot, the same slot he hosted at WOWO. Although WOWO changed the format of Macy's show, it did so solely in an attempt to expand Macy's listening audience, which did not, as Macy argues, have the effect of dissipating the

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47. 795 N.E.2d 1103 (Ind. Ct. App. 2003).

48. *Id.* at 1107.

49. *Id.*

50. *Id.* at 1107-08.

51. *Id.* at 1108.

52. *Id.* at 1110 (quoting Appellant's Brief 10).

53. See *Cullman Broad. Co. v. Bosley*, 373 So.2d 830 (Ala. 1979); *T.K. Communications, Inc. v. Herman*, 505 So.2d 484 (Fla. Dist. Ct. App. 1987); *New River Media Group, Inc. v. Knighton*, 429 S.E.2d 25 (Va. 1993).

goodwill it had fostered in him.<sup>54</sup>

The court then turned to the scope of the activities proscribed in the agreement. Focusing on the clause "engage in activities," Macy argued that the prohibition was overbroad and thus prevented him from being employed by any competing radio station in any capacity—even if the work was completely unrelated to the on-air services he had provided to WOWO.<sup>55</sup> The court of appeals looked to *Burk v. Heritage Food Service Equipment, Inc.*,<sup>56</sup> and concluded that Macy was correct. It determined that the scope of the proscribed activities "extend[ed] far beyond WOWO's legitimate interests in Macy, as an on-air personality," and therefore, this portion of the agreement was unreasonable.<sup>57</sup>

Finally, the court in *Pathfinder* examined whether the trial court erred in denying the motion for a preliminary injunction. The court relied heavily on its analysis of this issue in *Robert's Hair Designers, Inc. v. Pearson*.<sup>58</sup> The court distinguished the facts in the case before it from *Robert's*, noting that WOWO had not demonstrated that a single advertiser had defected to WGL as a consequence of Macy's move to the competitor and that the record did not indicate whether a significant number of listeners were listening to Macy following his departure from WOWO.<sup>59</sup> It concluded that WOWO failed to show that its remedies at law were inadequate, and therefore, the trial court did not abuse its discretion in denying the motion for a preliminary injunction.<sup>60</sup>

One last case decided during the review period that dealt with an interesting non-compete issue was *Vukovich v. Coleman*.<sup>61</sup> Vukovich was employed by International Magnaproducts, Inc. ("IMI"), which was owned by Coleman and which sold magnets. Vukovich entered into a non-compete agreement with IMI providing that Vukovich would not "directly or indirectly compete with the business of the Company . . . during the period of Employment and for a period of 5 (Five) years following termination of employment . . . ." <sup>62</sup> In cooperation

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54. *Pathfinder*, 795 N.E.2d at 1113.

55. *Id.* at 1114.

56. 737 N.E.2d 803 (Ind. Ct. App. 2000).

57. *Pathfinder*, 795 N.E.2d at 1114. The court noted, however, that because the contract was divisible, it could "blue pencil" the agreement, striking the unreasonable language, and leaving intact the language that was reasonable (i.e., employee will not ~~engage in activities~~ or be employed as an on-air personality).

58. 780 N.E.2d 858 (Ind. Ct. App. 2003); see *supra* notes 34-46 and accompanying text.

59. *Pathfinder*, 795 N.E.2d at 1117.

60. *Id.*

61. 789 N.E.2d 520 (Ind. Ct. App. 2003).

62. *Id.* at 522. It is interesting to note that the term "not compete," as used in the agreement, was defined as follows: "the Employee shall not own, manage, operate, consult to *or be employed in* a business substantially similar to or competitive with the present business of the Company . . . ." *Id.* (emphasis added). The prohibition against being employed, apparently in any capacity, is arguably comparable to the language that was "blue penciled" by the court in



with IMI, Vukovich formed and began to operate Alliance Motors LLC, a company that was supposed to sell motors. In addition, the parties apparently agreed that Vukovich would start a company called Alliance, LLC. This company was supposed to service certain clients of IMI "as sales representative."<sup>63</sup> Coleman contended, however, that Vukovich violated the non-compete agreement by selling magnets to people other than those that Vukovich and Coleman had agreed Alliance, LLC would service. IMI sued, and the trial court subsequently granted its motion for a temporary injunction.<sup>64</sup>

On appeal, the court noted that in order for a non-compete agreement to be enforceable, the employer must have a legitimate interest that the covenant is designed to protect, and the agreement must be reasonable with regard to the time period covered, the scope of activities proscribed, and the geographic region to which the non-compete applies.<sup>65</sup> The court concluded that this covenant was invalid because it contained no limitation with respect to geography: "A covenant not to compete that contains no geographic limitation is presumptively void."<sup>66</sup> What makes this case interesting is that this issue apparently has not been directly addressed in Indiana for some time because in reaching its conclusion, the court relied primarily on a case decided in 1973.<sup>67</sup> The court concluded that because the covenant "as written 'could apply to the entire world,'"<sup>68</sup> and because nothing in the agreement otherwise limited its geographic scope, it was not valid. The trial court thus should not have granted the temporary injunction.

#### V. "COLLAPSE" IN AN INSURANCE CONTRACT

In the insurance contract context, the court in *Monroe Guaranty Insurance Co. v. Magwerks Corp.*<sup>69</sup> defined the term "collapse" for the first time.<sup>70</sup> Magwerks was a one-story factory with a flat roof that was damaged by accumulated rain and snow. Roof panels fell to the floor, and water damaged the company's machinery, inventory, and other materials. Magwerks filed a claim with its insurer, Monroe Guaranty Insurance Company ("Monroe"), which Monroe ultimately denied because the "damage did not satisfy the definition of a 'collapse.'"<sup>71</sup> Magwerks sued. The trial court concluded as a matter of law that

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*Pathfinder*, 795 N.E.2d at 1114 as overbroad. See *supra* note 57 and accompanying text. The court, however, did not address this issue in *Vukovich*.

63. *Vukovich*, 789 N.E.2d at 523.

64. *Id.*

65. *Id.* at 525.

66. *Id.*

67. *Id.* (quoting *Struever v. Monitor Coach Co.*, 294 N.E.2d 654, 655 (Ind. Ct. App. 1973) ("It has long been the law in Indiana that a covenant not to compete containing no spatial limitations is void and unenforceable.")).

68. *Id.* at 526 (quoting *Struever*, 294 N.E.2d at 656).

69. 796 N.E.2d 326 (Ind. Ct. App. 2003).

70. *Id.* at 332.

71. *Id.* at 329. The insurance contract provided coverage for "collapse" in some instances,

Monroe had breached its contractual obligations "because the damage constituted a 'collapse' under the policy."<sup>72</sup> A jury subsequently awarded Magwerks \$1.1 million in compensatory damages and \$4 million in punitive damages.<sup>73</sup>

On appeal, Monroe argued that "collapse" referred to a situation that "occurs suddenly and results in complete disintegration."<sup>74</sup> This traditional definition is narrower, the court noted, than the modern definition of the word, which is used by the majority of jurisdictions today. The majority position is that a collapse occurs when "significant damage to the structural integrity is present,"<sup>75</sup> and some courts following this line of thinking do not even require parts of the building to fall. At least fifteen states have chosen to adopt this broader, more modern definition, and a number of those have done so as recently as 1995.<sup>76</sup> Accordingly, the Indiana Court of Appeals chose to join this group of jurisdictions.

Magwerks contended that under this definition, there clearly was a collapse at its factory. The company had to use more than one hundred buckets to catch water that was leaking into the building, it had to place tarps over the equipment, and "numerous ceiling panels . . . crashed through the floor."<sup>77</sup> However, Monroe countered that the roof was poorly designed and that this was part of the reason for the damage. Moreover, Monroe contended that the fact that its adjuster was able to walk on the roof without the roof falling in was a strong indication that there was no collapse. The court of appeals ultimately concluded that neither party had presented enough evidence for the trial court to determine whether a collapse had occurred under the modern definition of the word, and it remanded the case.<sup>78</sup>

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but the term was not defined in the contract. Instead, the agreement listed scenarios that did not amount to a collapse. *Id.* at 332.

72. *Id.* at 330.

73. *Id.* The jury concluded that Monroe had handled the claim in bad faith—hence the punitive damages award. *Id.*

74. *Id.* at 332 (citing *Dominick v. Statesman Ins. Co.*, 692 A.2d 188, 191-92 (Pa. 1997)). "A partial collapse of a part is entirely outside the contemplation of the parties to the insurance contract." *Id.* (quoting *Williams v. State Farm Fire & Cas. Co.*, 514 S.W.2d 856, 860 (Mo. Ct. App. 1974)).

75. *Id.* at 333 (citing *Guyther v. Nationwide Mut. Fire Ins. Co.*, 428 S.E.2d 238, 240 (N.C. Ct. App. 1993)).

76. Only nine states use the traditional definition of "collapse," and no jurisdiction has adopted the traditional definition since 1970. *Id.* (citing *What Constitutes "Collapse" of a Building Within Coverage of Property Insurance Policy*, 71 A.L.R.3d 1072 §§ 3, 4 (1976 & Supp. 2002)).

77. *Id.*

78. *Id.* at 334.



## VI. REMEDIES

*A. Specific Performance for Sellers of Real Property*

Two recent decisions addressed the issue of awarding specific performance to the seller in a transaction for the sale of real property. In *Kesler v. Marshall*,<sup>79</sup> Kesler entered into an agreement to purchase Marshall's property, but Marshall was required, as a condition precedent to Kesler's obligation, to show in writing "that the property could be used in any manner under M-1 zoning."<sup>80</sup> The court of appeals concluded that there was insufficient evidence presented in the trial court to show that Marshall had satisfied this condition, and thus, the lower court erred in granting Marshall specific performance.<sup>81</sup>

The court went on, however, to analyze the general appropriateness of granting specific performance to sellers in real estate transactions, and it focused on whether Marshall would have had an adequate remedy at law.<sup>82</sup> The court noted that Marshall held Kesler's earnest money, which he could have kept upon termination of the agreement, and that he then could have sold the property to someone else. If, upon selling the property, he had not received the full benefit of his original bargain with Kesler, he could have sought the difference in money damages. This would have made him whole.<sup>83</sup> Finally, the court stated that "the traditional rationale underlying the grant of specific performance in real estate transactions, i.e., that each piece of property is unique, does not apply here to the party seeking specific performance, Marshall, because he is not obtaining the property in the transaction, but rather only money."<sup>84</sup> If Marshall had been entitled to a remedy, his remedy at law would have been adequate, and thus he should not have been awarded specific performance.

In *Humphries v. Ables*,<sup>85</sup> the same panel of the court of appeals that decided *Kesler* reached the opposite conclusion with regard to the appropriateness of awarding specific performance to the seller in the real estate transaction at issue there. Max and Betty Ables owned a liquor store that Marc and Kelle Humphries wished to purchase. The parties entered into a contract for sale of the property, but the Humphries ultimately failed to perform their obligations under the agreement. The Ables sued for breach of contract and prevailed, and the trial

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79. 792 N.E.2d 893 (Ind. Ct. App. 2003).

80. *Id.* at 896.

81. "A party seeking specific performance of a real estate contract must prove that he has substantially performed his contract obligations or offered to do so." *Id.*

82. "Our courts generally will not exercise equitable powers when an adequate remedy at law exists." *Id.* at 897 (citations omitted).

83. *Id.*

84. *Id.* The court cited cases from Maine, North Dakota, Illinois, Pennsylvania, and Colorado, primarily for the proposition that specific performance is only appropriate if the party does not have an adequate remedy at law. *Id.*

85. 789 N.E.2d 1025 (Ind. Ct. App. 2003).

court awarded them, as sellers, specific performance of the contract.<sup>86</sup>

The court of appeals stated, "It is a matter of course for the trial court to grant specific performance of a valid contract for the sale of real estate,"<sup>87</sup> and it essentially ignored whether the seller had an adequate remedy at law. Instead, the majority turned to *Migatz v. Stieglitz*<sup>88</sup> where the Indiana Supreme Court awarded specific performance to the seller in a real estate transaction:

The equitable doctrine is that the enforcement of contracts must be mutual, and, the vendee being entitled to specific performance, his vendor must likewise be permitted in equity to compel the acceptance of his deed and the payment of the stipulated consideration. This remedy is available, although the vendor may have an action at law for the purchase money.<sup>89</sup>

The court in *Humphries* noted that it had found no authority that changed "this time honored principle,"<sup>90</sup> and it went on to say that "vendors traditionally have qualified for the remedy of specific performance of a real estate contract after a purchaser's breach."<sup>91</sup>

An important distinction between this case and *Kesler* is that the contract between the Humphries and the Ables explicitly provided the remedies that the sellers could pursue following the buyers' breach. Specifically, the agreement stated that upon breach, the Ables could "declare the entire unpaid balance of this contract immediately due and payable, and in such event, Sellers may pursue whatever remedies, legal or equitable, are available to collect the entire unpaid balance of the purchase price."<sup>92</sup> The court stated that it would not "invalidate a remedy for which the Sellers contracted."<sup>93</sup> The parties agreed, of their own free will, that specific performance was an appropriate remedy, and the courts will enforce contracts that are "entered into freely and voluntarily."<sup>94</sup>

This difference in facts between *Kesler* and *Humphries* and the assertion made by the Indiana Supreme Court in *Migatz* do not seem to be enough, though,

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86. *Id.* at 1029.

87. *Id.* at 1034.

88. 77 N.E. 400 (Ind. 1906).

89. *Id.* at 401. It is interesting to note that Judge Sullivan, in his concurring opinion in *Kesler v. Marshall*, cited this same passage from *Migatz*, but still concluded that Marshall, the seller, was not entitled to specific performance. *Kesler*, 792 N.E.2d at 898 (Sullivan, J., concurring).

90. *Humphries*, 789 N.E.2d at 1035.

91. *Id.* (citing 14 JAMES H. BACKMAN, POWELL ON REAL PROPERTY § 81.04[1][a] (2003)). Aside from the omission of any discussion of whether the sellers' remedy at law was adequate, this assertion is even more curious given that the court also stated that the number of cases in Indiana awarding specific performance of a real estate contract to a seller was "rather small," and that the reasons for doing so are "less compelling than the reasons for awarding specific performance to purchasers following a vendor's breach . . . ." *Id.*

92. *Id.* (quoting Appendix at 16-17).

93. *Id.* at 1036.

94. *Id.*



to justify ignoring the requirement that the non-breaching party show an inadequate remedy at law before being granted an equitable remedy. In addition, the court in *Robert's Hair Designers, Inc. v. Pearson*<sup>95</sup> noted that while the non-compete agreement there provided that the hair salon could seek injunctive relief upon breach, "such contract provisions requiring the issuance of an injunction are not binding upon the trial court."<sup>96</sup> Arguably, the same principle would apply in this situation where a party contracted for and later sought another form of equitable relief—specific performance. However, only one judge raised the issue of an adequate legal remedy. Judge Kirsch dissented from the majority's position on specific performance, asserting that typically "the seller's remedy at law . . . for money damages will be sufficient to fully compensate the plaintiff."<sup>97</sup> Judge Kirsch concluded that there were no facts in the case at issue supporting a conclusion that there was no adequate remedy at law available to the sellers, and thus specific performance should not have been granted.<sup>98</sup>

*B. Fraudulent Inducement and Benefit of the Bargain Damages*

*Lightning Litho, Inc. v. Danka Industries, Inc.*<sup>99</sup> presented an interesting damages question in a case involving a contract entered into as a result of fraudulent misrepresentations. In that case, Linn, a salesperson for Danka, tried repeatedly to convince Haab, the owner of Lightning Litho ("Litho"), to lease a high-volume copier. Haab continued to reject Linn's overtures until Linn told Haab that he had a client Linn could bring to Haab that would justify Haab's leasing the machine. When Haab asked who the client was, Linn replied that he would not reveal the name until Haab signed the lease. Linn later returned with a manager from Danka who provided further assurances that the client would accompany the copier. Haab signed the lease agreement, and predictably, the client never materialized.<sup>100</sup>

Litho eventually brought a fraudulent inducement claim against Danka,<sup>101</sup> and after a couple of false starts, affirmed the contract<sup>102</sup> and requested both contract and tort damages.<sup>103</sup> Danka argued that Litho did not present evidence supporting its damages request, and the trial court granted Danka's motion for judgment on the evidence. Litho appealed, and the court of appeals reversed.

95. 780 N.E.2d 858 (Ind. Ct. App. 2003) (citation omitted).

96. *Id.* at 862 n.1.

97. *Humphries*, 789 N.E.2d at 1036-37 (Kirsch, J., dissenting).

98. *Id.* at 1037 (Kirsch, J., dissenting).

99. 776 N.E.2d 1238 (Ind. Ct. App. 2002).

100. *Id.* at 1039-41.

101. *Id.* at 1240. Fraudulent inducement exists when a person enters into a contract as the result of fraudulent misrepresentations. When this occurs, the plaintiff must choose to seek either to rescind the contract (in which case the parties would return to their respective positions prior to entering the agreement) or to affirm the contract and seek damages. *Id.* at 1241 (citations omitted).

102. *Id.*

103. *Id.* at 1240.

The court of appeals cited cases from approximately twenty-four jurisdictions for the proposition that the damages available in a fraudulent inducement case where the plaintiff has affirmed the contract are measured by the benefit of the bargain rule.<sup>104</sup> "Although the benefit of the bargain rule is traditionally used to measure damages in breach of contract cases, it is also used to measure damages in fraudulent inducement cases because fraudulent inducement is a 'hybrid' of tort and contract."<sup>105</sup> While some Indiana cases have held that tort law does not protect a buyer's interest in "the benefit of his bargain,"<sup>106</sup> those cases are distinguishable because the theory of recovery in those lawsuits was negligence (a tort), not fraudulent inducement (a cross between tort and contract claims).<sup>107</sup> Consequently, the court concluded that Indiana should join other jurisdictions in measuring the damages in fraudulent inducement claims using the benefit of the bargain rule.<sup>108</sup>

*C. Breach of Contract and Tortious Conduct—But Only One Recovery*

*INS Investigations Bureau, Inc. v. Lee*<sup>109</sup> involved tort and contract claims, and after concluding that the damages awarded at trial amounted to a double recovery, the court of appeals had to decide whether to vacate the tort award or the damages awarded for the contract claim. The fire caused significant damage to a factory that manufactured modular units for Lees Inns motels. The Home Indemnity Company ("Home Indemnity"), which insured the factory, hired INS Investigations Bureau, Inc. ("INS") to investigate the origin of the fire. Lester Lee and Bill Lee ("the Lees"), who founded Lees Inns and were the majority stockholders, hired their own investigator, who concluded that airflow to a furnace had been blocked by sawdust and that when parts of the furnace overheated, the sawdust ignited. Home Indemnity disagreed and denied the Lees' claim, finding that the fire was intentionally set and that the Lees were somehow connected to that act.<sup>110</sup>

The Lees sued Home Indemnity, but eventually the parties settled the dispute. The settlement included not only a \$3.5 million payment to the Lees and a letter of apology from Home Indemnity, but also an assignment from Home Indemnity of "any claims it had against INS to the Lees . . . ."<sup>111</sup> The Lees subsequently sued INS, and it made the following claims:

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104. *Id.* at 1241 n.4. Damages awarded under the benefit of the bargain rule place the parties in the positions they would have been in if the contract had been performed as promised. *Id.* at 1242.

105. *Id.*

106. *See, e.g.,* Choung v. Iemma, 708 N.E.2d 7, 14 (Ind. Ct. App. 1999).

107. *Lightning*, 776 N.E.2d at 1242.

108. *Id.* at 1243.

109. 784 N.E.2d 566 (Ind. Ct. App. 2003).

110. *Id.* at 571-74. The insurance policy allowed for the denial of a claim "if the Lees or someone at their direction committed arson" at the factory. *Id.* at 571.

111. *Id.* at 572.



(1) that INS breached its contract with Home Indemnity by failing to perform its obligations in a skillful, careful, diligent, and workmanlike manner, which caused the denial of the Lees' claim and a subsequent settlement greatly in excess of the policy limits; (2) that INS and its employees owed Home Indemnity a duty of care to perform services in a skillful, careful, diligent, and workmanlike manner, and that INS's breach of that duty was a proximate cause of the erroneous denial of the Lees' claim and the subsequent litigation; and (3) that INS and its employees acted fraudulently, oppressively, maliciously, and outrageously toward Home Indemnity and the Lees and were thus liable for punitive damages.<sup>112</sup>

At the end of the ensuing trial, the jury awarded the Lees more than \$2.3 million in compensatory damages for breach of contract, more than \$2.5 million in compensatory damages for negligence, and \$4.6 million in punitive damages.<sup>113</sup>

On appeal, INS argued that the trial court erred in a number of areas, but the contention relevant here was that the claims for breach of contract and negligence were essentially one in the same and that the damages awarded constituted a double recovery.<sup>114</sup> The court stated that when a party contracts to do work, there exists an implied duty to do so with skill, with care, and in a workmanlike fashion. If one negligently fails to fulfill this duty, the individual has committed a tort and a breach of contract.<sup>115</sup> However, the non-breaching party "may not recover twice for the same wrong,"<sup>116</sup> so the court of appeals had to decide whether to vacate the award for negligence or the award for breach of contract.

Apparently, no Indiana decisions previously addressed this question, and there must also have been little case law available from other jurisdictions because the court turned to a secondary source for guidance in resolving this issue. It stated that as a general rule, "a breach of contract is not a tort,"<sup>117</sup> but the contract can provide the backdrop from which the duty of care in a tort action arises. "In such cases, the contract is mere inducement creating the state of things which furnishes the occasion of the tort. In other words, the contract creates the relation out of which grows the duty to use care."<sup>118</sup> The court concluded that the heart of the Lees' claim was not that INS had breached its contract with Home Indemnity; rather, the Lees claimed that INS owed Home Indemnity a duty to fulfill its contractual obligations skillfully and in the manner generally expected of others in the same line of work.<sup>119</sup> Because this claim sounded more in tort than in contract, the court of appeals vacated the award of \$2,303,601 for breach

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112. *Id.* at 573.

113. *Id.*

114. *Id.* at 576.

115. *Id.* (citing *Homer v. Burman*, 743 N.E.2d 1144, 1147 (Ind. Ct. App. 2001)).

116. *Id.* at 577.

117. *Id.*

118. *Id.* at 578 (quoting 57A AM. JUR. NEGLIGENCE §§ 119-21).

119. *Id.*

of contract, and affirmed the recovery of \$2,546,404 for the tort claim.<sup>120</sup>

#### VII. A REMINDER TO CLIENTS: THE TERMS OF THE CONTRACT WILL BE ENFORCED

Two cases decided during the review period remind practitioners of the importance of stressing to their clients the fact that when people enter into contracts in Indiana, the parties will be bound even if they later conclude that the deal they made was a bad one. In *Zollman v. Geneva Leasing Associates, Inc.*,<sup>121</sup> Wally Zollman ("Wally") and a partnership he controlled borrowed \$3.2 million from Geneva Leasing Associates ("Geneva"), and Wally signed a personal guaranty. When Wally later requested an extension of the payment period, Geneva agreed, but only on the condition that Wally's spouse, Brenda Zollman ("Brenda"), execute a personal guaranty. She agreed to do so, and the guaranty that she signed included a provision that released Geneva "from any and all claims, liabilities, demands, damages and causes of action which any of the releasing parties has asserted . . . or might now or hereafter assert . . ."<sup>122</sup> When the partnership later defaulted and Geneva accelerated the payments due under the note, the partnership and Wally declared bankruptcy, and Geneva sued Brenda.<sup>123</sup> The trial court granted Geneva's summary judgment motion against Wally, *in rem*, and against Brenda, *in personam*, in an amount exceeding \$1.6 million, plus costs and attorney fees.<sup>124</sup> On appeal, the court agreed "with Geneva that Brenda . . . contractually waived" the defense she attempted to raise.<sup>125</sup>

While the court discovered no Indiana case law interpreting a release within a guaranty, it relied on decisions that addressed releases generally. It noted that the release clearly stated that Brenda was waiving her rights and that Brenda did not argue that the release was ambiguous. "Indeed, there is no evidence in the record before us on appeal that the bargaining between the parties was anything other than free and open. Moreover, the facts establish that Brenda was a sophisticated party and was represented by legal counsel during the negotiation of the guaranty agreement."<sup>126</sup> Thus, she could not later raise an affirmative defense.<sup>127</sup>

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120. *Id.*

121. 780 N.E.2d 387 (Ind. Ct. App. 2002).

122. *Id.* at 389. The release was printed in capital letters and covered numerous contingencies intended to protect the lender from liability.

123. *Id.* at 390. Geneva also sued Wally, *in rem*, "after the bankruptcy court lifted" the bankruptcy stay for that specific purpose. *Id.*

124. *Id.*

125. *Id.* at 391.

126. *Id.* at 392-93.

127. *Id.* at 393. Chief Judge Brook disagreed. "Simply put, Brenda waived her rights to sue Geneva, file a counterclaim against Geneva, or file a claim against a third party; she did *not* waive her right to interpose affirmative defenses . . ." *Id.* (emphasis in original) (Brook, J., dissenting).



In *Grott v. Jim Barna Log Systems—Midwest, Inc.*,<sup>128</sup> Mark and Barbara Grott (“the Grotts”) entered into a contract to purchase a log home from Jim Barna Log Systems (“Barna”). Peter Rosi (“Rosi”) signed the contract as “owner” of Barna. The contract included a clause providing that disputes would be decided in the Tennessee courts and according to Tennessee law.<sup>129</sup> Approximately nineteen months later, the Grotts sued for breach of contract (among other things) in LaPorte Circuit Court in Indiana. Barna and Rosi asked the court to honor the forum-selection clause and thus to dismiss the lawsuit. The court granted their request, and the Grotts appealed, arguing that the forum-selection provision “was not freely negotiated” and that it was unreasonable.<sup>130</sup>

The court of appeals disagreed with the Grotts. The court pointed out that there was no indication that the Grotts objected to the clause at issue or that they attempted to have it removed from the agreement. There was no suggestion that Mr. Grott “initialed each paragraph and signed the contract unwillingly or was unaware of the forum-selection clause.”<sup>131</sup> Simply put, the Grotts failed to show that they were unable to negotiate the removal of the provision or that they could not have purchased the home from another seller of log homes. “As a general rule, the law allows competent adults the utmost liberty in entering into contracts,” and those contracts will be enforced “when entered into freely and voluntarily . . . .”<sup>132</sup> The Grotts were bound to the terms of their contract.

## VIII. SALE OF GOODS UNDER ARTICLE 2

The courts addressed the following important issues under Article 2 of the Uniform Commercial Code: the relationship of the entrustment provisions of the code to Indiana’s Certificate of Title Act; the circumstances under which a person with voidable title can transfer good title to a buyer; the point at which title to goods passes to a buyer; what constitutes an admission for purposes of the admission exception to the statute of frauds; and the need for the writing under the statute of frauds to be clearly connected to the sale of the goods.

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128. 794 N.E.2d 1098 (Ind. Ct. App. 2003).

129. *Id.* at 1100-01.

130. *Id.* at 1101.

131. *Id.* at 1103.

132. *Id.* The Grotts also argued that because Rosi signed the contract as a representative of Barna, he was not a party to the contract and thus was not subject to the forum-selection clause. The court turned to a Texas decision which held that forum-selection provisions apply to so-called “transaction participants.” *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 75 (Tex. Ct. App. 1996). A transaction participant is “an employee of one of the contracting parties who is individually named by another contracting party in a suit arising out of the contract containing the forum selection clause.” *Id.* The court of appeals in *Grott* followed this line of thinking and concluded that Rosi was a transaction participant and thus was subject to the forum selection provision. If the Grotts wanted to sue him, they had to do it in Tennessee. *Grott*, 794 N.E.2d at 1105.

*A. Entrustment and the Certificate of Title Act*

In *Madrid v. Bloomington Auto Co.*,<sup>133</sup> the court clarified the relationship between Indiana's Certificate of Title Act and Article 2 of the Uniform Commercial Code (UCC),<sup>134</sup> and it also interpreted the UCC's entrustment provisions.<sup>135</sup> The Madrids were interested in buying a Lincoln Navigator and visited Gary Pratt University Motors, Inc. ("Pratt"), a used car dealer located in West Lafayette, Indiana.<sup>136</sup> Pratt discovered that Royal Lincoln Mercury Nissan ("Royal"), a Lincoln dealership located in Bloomington, Indiana, owned "a new 2000-model-year Navigator," and Pratt requested that Royal bring the vehicle to West Lafayette so that the Madrids could see it.<sup>137</sup>

In early June 2001, one of Royal's employees drove the Navigator to West Lafayette, but Royal retained the vehicle's certificate of origin, as well as its owner's manuals, extra keys, and phone.<sup>138</sup> When the Madrids came to inspect the vehicle, Pratt told them that it had bought the Navigator for \$40,000 and that it hoped to sell it to the Madrids for \$43,000. In fact, Pratt had not purchased the vehicle from Royal.<sup>139</sup>

The parties agreed on a purchase price of \$41,500, which the Madrids paid to Pratt, and Pratt promised to deliver the title, paperwork, and other accessories to the buyers. Of course, it could not follow through on this promise because all of those items remained in Royal's possession. In the meantime, Royal continued to call Pratt for updates regarding the prospective sale until finally, in the latter part of June 2001, Royal learned that there was a police seizure of Pratt's automobiles. Royal's general manager drove to West Lafayette to retrieve the dealership's vehicle but discovered that it was not among the vehicles seized because the Madrids possessed it.<sup>140</sup>

The Madrids sued Royal seeking the title to the Navigator, but the trial court

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133. 782 N.E.2d 386 (Ind. Ct. App. 2003).

134. The text of this article may contain references to generic sections of the Uniform Commercial Code (e.g., section 2-201), but all notes will contain specific citations to Indiana's version of the UCC (e.g., IND. CODE ANN. § 26-1-2-201 (West 2003)).

135. IND. CODE ANN. § 26-1-2-403.

136. *Madrid*, 782 N.E.2d at 389. Pratt was not an authorized dealer of Lincoln vehicles and thus was not permitted to sell new Lincoln autos. "It is an unfair practice for a dealer to sell any new motor vehicle having a trade name, trade or service mark, or related characteristics for which the dealer does not have a franchise in effect at the time of the sale." IND. CODE ANN. § 9-23-3-4.

137. *Madrid*, 782 N.E.2d at 389. Pratt and Royal had done this before. If Pratt had a customer interested in buying a new Lincoln, it would request that Royal bring a new auto to West Lafayette for the customer to inspect. If the customer chose to buy the vehicle, the customer would pay Royal directly. Subsequently, Royal would pay a "finder's fee" to Pratt for establishing the contact between Royal and the buyer. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 390.



concluded that Royal was entitled to summary judgment. More specifically, it determined that through its retention of the certificate of origin, Royal retained ownership of the vehicle under Indiana's Certificate of Title Act,<sup>141</sup> and in the alternative, that Royal's actions did not lead to a transfer of ownership under the entrustment provisions of the UCC.<sup>142</sup>

The first issue that the court of appeals considered was whether the sales provisions of the UCC or Indiana's Certificate of Title Act controls in determining who holds legal title to a motor vehicle in Indiana.<sup>143</sup> Royal argued that the Certificate of Title Act controlled, and it relied on an Ohio Supreme Court case interpreting that state's title statute and its relationship to Ohio's version of the Uniform Commercial Code.<sup>144</sup> The court of appeals rejected this argument, however, distinguishing the Ohio statute from Indiana's, and relying on Indiana case law interpreting an earlier version of the Certificate of Title Act.<sup>145</sup> The court agreed with the Madrids' contention that the current version of the Certificate of Title Act results in a "registration" type system rather than an "ownership" type system . . . [and consequently,] legal ownership of vehicles is determined by the sales provisions of the UCC."<sup>146</sup>

The court turned next to the entrustment provisions of the Uniform Commercial Code, which provide that "any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in [the] ordinary course of business."<sup>147</sup> The trial court concluded that Royal retained ownership of the Navigator because it did not entrust the vehicle to Pratt, Pratt was not a merchant who dealt in goods of that kind, and the Madrids "should have known" that Pratt did not own the automobile and was not authorized to sell it to them.<sup>148</sup> The court of appeals disagreed with the lower court on all three points.

The court summarily dismissed the trial court's conclusion that the vehicle was not entrusted to Pratt, noting that entrustment includes "*any* delivery and *any*

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141. An individual "may not purchase or acquire a new motor vehicle without obtaining from the seller of the motor vehicle a valid manufacturer's certificate of origin." IND. CODE ANN. § 9-17-8-2 (West 2003).

142. *Madrid*, 782 N.E.2d at 390; *see also* IND. CODE ANN. § 26-1-2-403 (West 2003).

143. To this point, "no Indiana court [had] discussed the effect of the current Indiana Certificate of Title Act on the sales provisions of the UCC." *Madrid*, 782 N.E.2d at 390.

144. *See* *Saturn of Kings Automall, Inc. v. Mike Albert Leasing, Inc.*, 751 N.E.2d 1019 (Ohio 2001).

145. The court stated, "Ohio's Certificate of Motor Vehicle Title Law is substantially different than Indiana's Certificate of Title Act." *Madrid*, 782 N.E.2d at 393. The Ohio statute provides that "[n]o person . . . shall acquire any right, title, claim, or interest in or to the motor vehicle until there is issued to the person a certificate of title . . ." OHIO REV. CODE ANN. § 4505.04(A) (West 2004). The Indiana Title Act, however, "does not expressly limit the passing of legal title until the certificate of title is issued." *Madrid*, 782 N.E.2d at 393.

146. *Madrid*, 782 N.E.2d at 395.

147. IND. CODE ANN. § 26-1-2-403(2).

148. *Madrid*, 782 N.E.2d at 390.

acquiescence" in the entrusted party's retention of the goods.<sup>149</sup> It did not matter that "the vehicle was only brought to University Motors so that the Madrids could inspect the vehicle."<sup>150</sup> Royal then asserted that Pratt was not a merchant dealing in goods of that kind because it did not deal "in new Lincoln cars."<sup>151</sup> The court of appeals determined that Royal's interpretation was too narrow and agreed with the Madrids' position "that it is sufficient that both University Motors and Royal were car dealers" because both dealt in goods that were fundamentally the same.<sup>152</sup>

Finally, the court addressed whether the Madrids were buyers in the ordinary course of business.<sup>153</sup> The trial court stated that the Madrids likely had notice of the identity of the true owner of the Navigator and that they should have known that Pratt was not an authorized Lincoln dealership; consequently, they did not qualify as buyers in the ordinary course of business.<sup>154</sup> The court of appeals reviewed the facts and concluded that the only evidence even raising an inference that the sale might have been outside the ordinary course was Pratt's failure to give the Madrids a certificate of origin when it sold the Navigator to them.<sup>155</sup> However, "the failure of a buyer to demand a certificate of title at the time of the sale [does] not result in the buyer losing its status as a buyer in the ordinary course of business."<sup>156</sup> The court reversed the decision and remanded the case.<sup>157</sup>

### *B. Voidable Title and Transfer of Good Title*

*Marlow v. Conley*<sup>158</sup> also dealt with section 2-403 of the Uniform Commercial Code. There, Robert Medley purchased a 1932 Ford truck at an Indianapolis car show. The seller was Herchel Ray Conley who told Medley that he operated a

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149. IND. CODE ANN. § 26-1-2-403(3) (emphasis added).

150. *Madrid*, 782 N.E.2d at 396 (quoting Appellant's App. at 75).

151. *Id.*

152. *Id.* (citing *Shacket v. Philco Aviation, Inc.*, 681 F.2d 506 (7th Cir. 1982), *cert. granted in part*, 459 U.S. 1069 (1982), *rev'd on other grounds*, 462 U.S. 406 (1983)). The court in *Shacket* stated, "The term 'goods of that kind' is not limited to the same goods but encompasses goods of the same fundamental nature." *Shacket*, 681 F.2d at 511.

153. The statute defines "buyer in the ordinary course of business" as follows: "[A] person that buys goods in good faith without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person . . . in the business of selling goods of that kind. A person buys in the ordinary course of business if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices." IND. CODE ANN. § 26-1-1-201(9) (West 2003).

154. *Madrid*, 782 N.E.2d at 396.

155. *Id.* at 397.

156. *Id.* (citation omitted).

157. *Id.* at 397-98. This is the proper result, particularly given the intent of the statute to favor the innocent third party and thus to promote commerce. See *Mowan v. Anweiler*, 454 N.E.2d 436, 439 (Ind. Ct. App. 1983).

158. 787 N.E.2d 490 (Ind. Ct. App. 2003).



“buy here, pay here car lot.”<sup>159</sup> Medley noted that the truck had a dealer license plate on it. He purchased it as a gift for his wife Linda, and he paid \$7500. Conley provided Medley with the certificate of title, but Donald Marlow was listed as the owner. Medley inquired about this fact, and Conley told him that “Marlow had signed the title as part of a deal Conley had made with him.”<sup>160</sup> Medley subsequently sought a certificate of title from the Bureau of Motor Vehicles in his wife’s name.

Approximately seven months later, Marlow filed suit against Conley and the Medleys, seeking replevin of the truck. Marlow contended at trial that Conley had asked him to invest in Conley’s business, and that Marlow had given him \$4500. Marlow then stated that Conley stole the truck and its certificate of title and that when Marlow asked Conley to return the truck, Conley told him the truck had caught on fire.<sup>161</sup> Marlow called the police, but the police report told a story that did not comport with Marlow’s testimony at trial. According to the police report, Marlow and Conley apparently had entered into a deal whereby Marlow would provide Conley with \$4500 and the 1932 Ford truck in exchange for a 1994 Ford flatbed dump truck and a 1989 Ford Bronco. Conley gave Marlow several titles of vehicles (thought to be junk), but he never delivered the two Fords to Marlow.<sup>162</sup>

The question on appeal was whether the Medleys obtained good title to the truck that Robert Medley purchased at the auto show in Indianapolis. The statute at issue was Indiana Code section 26-1-2-403(1), which provides as follows: “A person with voidable title has power to transfer a good title to a good faith purchaser for value.”<sup>163</sup> While the UCC does not define “voidable title,” it does state that the person possessing voidable title has the power to transfer good title to a good faith purchaser for value “even though . . . the delivery was procured through fraud.”<sup>164</sup> The “defrauding buyer” thus obtains voidable title, and “when title gets into the hands of a bona fide purchaser for value then he will prevail over the defrauded seller.”<sup>165</sup>

The trial court did not believe Marlow’s story about Conley stealing the truck, and consequently, the court of appeals concluded that Conley defrauded Marlow, that Conley thereby obtained voidable title to the 1932 Ford, and that Conley could transfer good title to a good faith purchaser for value.<sup>166</sup> Clearly, the Medleys were purchasers for value. The question was whether they acted in good faith.<sup>167</sup>

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159. *Id.* at 491.

160. *Id.*

161. *Id.*

162. *Id.* at 491-92.

163. IND. CODE ANN. § 26-1-2-403(1) (West 2003).

164. *Id.* § 26-1-2-403(1)(d).

165. *Marlow*, 787 N.E.2d at 493 (quoting *Mowan v. Anweiler*, 454 N.E.2d 236, 238 (Ind. Ct. App. 1983)).

166. *Id.* at 495.

167. Good faith is defined as “honesty in fact in the conduct or transaction concerned.” IND.

Marlow contended that they did not, and he argued that the sale from Conley to Robert Medley violated Indiana's Certificate of Title Act.<sup>168</sup> The Court of Appeals relied on its analysis in *Madrid v. Bloomington Auto Co.*<sup>169</sup> and concluded that the Medleys' failure to request a title in compliance with the Certificate of Title Act did not affect their status as good faith purchasers. "Although the failure to comply with Ind. Code § 9-17-3-3 may, combined with other suspicious circumstances, raise questions about a purchaser's good faith, we find no such circumstances here."<sup>170</sup> In short, as a holder of voidable title, Conley had the power to pass good title to the Medleys as long as they were good faith purchasers for value. The court concluded that the Medleys did purchase the truck in good faith, and it affirmed the lower court's decision in their favor.<sup>171</sup>

### C. *The Passing of Title to Goods*

*Sam and Mac, Inc. v. Treat*<sup>172</sup> involved a question of whether title to undelivered goods that were paid for in full passed from the seller to the buyer (and if so, when) under Article 2 of the Uniform Commercial Code. Sam and Mac, Inc. ("SMI"), a construction and contracting company, entered into a contract whereby Gruda Enterprises, Inc. would sell to SMI and install in the house that SMI was building a set of kitchen cabinets. Gruda Enterprises ordered the cabinets from the manufacturer, and SMI pre-paid the order in full.<sup>173</sup> At some point following that payment, the cabinets arrived at the seller's warehouse, and a representative of Gruda Enterprises contacted SMI to arrange for the delivery and installation of the goods.<sup>174</sup> However, SMI was not prepared to receive them and requested that the cabinets remain at the warehouse until SMI was ready to have them installed.<sup>175</sup>

Unfortunately for SMI, approximately two months later, Anthony and Sharon

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CODE ANN. § 26-1-1-201(19) (West 2003).

168. *See id.* § 9-17-3-3.

169. *See supra* notes 143-46 and accompanying text.

170. *Marlow*, 787 N.E.2d at 497-98. The only evidence suggesting that the Medleys acted in bad faith was that the title that Conley provided Robert Medley was signed by Marlow. Conley should have transferred the title to his name before selling the truck. *Id.* at 496. However, Robert Medley's testimony regarding the dealer license plate and his inquiry about the signature on the title, among other facts, further supported the Medleys' position that they acted in good faith. Marlow also argued that the Medleys violated Indiana's Certificate of Title Act by providing false information to the Bureau of Motor Vehicles, (i.e., by allegedly listing Marlow, rather than Conley, as the seller of the truck). *Id.* at 498. The court of appeals stated that "although false statements to the Bureau of Motor Vehicles under Ind. Code § 9-17-2-2 could result in prosecution for perjury, such false statements do not affect legal title to the vehicle." *Id.*

171. *Id.* at 499.

172. 783 N.E.2d 760 (Ind. Ct. App. 2003).

173. *Id.* at 762.

174. *Id.* at 766-67.

175. *Id.* at 765.



Gruda, who owned and operated Gruda Enterprises, filed for personal bankruptcy and ceased the company's business operations.<sup>176</sup> The cabinets were never delivered to SMI, so SMI contacted James Treat, the landlord for Gruda Enterprises, and requested that he open the warehouse to allow SMI to remove the cabinets. Treat refused, and SMI sued him for criminal conversion. SMI argued that it held title to the cabinets under Article 2 of the UCC. Following entry of partial summary judgment for SMI and a reversal of that decision on interlocutory appeal, the trial court granted summary judgment in Treat's favor, and SMI appealed.<sup>177</sup>

SMI argued that the transaction between SMI and Gruda Enterprises constituted a "completed sale,"<sup>178</sup> and that SMI consequently held title to the cabinets under section 2-401(3)(b) of the UCC.<sup>179</sup> The court of appeals correctly disagreed with SMI's contention. It was clear that the goods were supposed to be delivered to the house that SMI was building, so the goods obviously had to be moved from the warehouse, rendering section 2-401(3)(b) inapplicable. Instead, section 2-401(2)(b)—which states that "if the contract requires delivery at destination, title passes on tender there"<sup>180</sup>—controlled. "The title to the cabinets did not pass to SMI because the cabinets were not delivered and installed at the agreed upon destination."<sup>181</sup> Therefore, SMI never obtained any possessory interest in the goods, and the court of appeals affirmed the lower court's grant of summary judgment in Treat's favor.<sup>182</sup>

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176. *Id.* at 762.

177. *Id.* at 763.

178. *Id.* at 764.

179. "Unless otherwise explicitly agreed, where delivery is to be made without moving the goods[,] . . . if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting." IND. CODE ANN. § 26-1-2-401(3)(b) (West 2003).

180. *Id.* § 26-1-2-401(2)(b).

181. *Sam and Mac*, 783 N.E.2d at 765. The court also noted that while title to the goods cannot pass to the buyer until the goods are identified to the contract, "identification does not, in and of itself, confer either ownership or possessory rights in the goods." *Id.* (citing IND. CODE ANN. § 26-1-2-401(1) (West 2003) ("Title to goods cannot pass under a contract for sale prior to their identification to the contract . . .").

182. *Id.* at 767. Interestingly, *Howland v. Indiana Department of State Revenue*, 790 N.E.2d 627 (Ind. Tax Ct. 2003) also involved an issue relating to the title to goods. There, the question was "whether Howland's sale and installation of . . . satellite dishes [were] taxable 'retail unitary transactions.'" *Id.* Resolution of the issue turned at least in part on when title passed from the seller to the buyer. The court relied on *Farmers' National Bank of Sheridan v. Coyner*, 88 N.E. 856 (Ind. Ct. App. 1909) to determine when title passed, without considering the title provisions of Article 2. *Howland*, 790 N.E.2d at 630. Arguably, however, even though the sale included both personal property and the provision of services, the transaction constituted a sale of goods covered by Article 2 of the Uniform Commercial Code. In situations that involve both goods and services, Indiana applies the predominant thrust test. Under this test, the court must determine "whether the transaction's 'predominant factor, [its] thrust, [its] purpose . . . is the rendition of service, with

*D. The Admission Exception to the Statute of Frauds*

Section 2-201 of the Uniform Commercial Code provides the circumstances under which a contract for the sale of goods must be in writing under the statute of frauds,<sup>183</sup> and also includes a number of exceptions to the writing requirement, including the admission exception.<sup>184</sup> *Wehry v. Daniels*<sup>185</sup> presented a question that had not been previously addressed by Indiana's courts: namely, what constitutes an admission under section 2-201(3)(b).

In the fall of 2001, Daniels, a seller of Formula One memorabilia, sold an autographed Michael Schumacher helmet to Wehry for \$3500. While Wehry was in the store, he apparently told Daniels that he would like to purchase a scaled-down reproduction of a 1985 Ayrton Senna helmet. Daniels informed Wehry that the helmet was only sold in a set of three and that the price of the set was \$9000. When Wehry responded that he was only interested in the 1985 helmet and that he was willing to pay up to \$3000 for it, Daniels told him that he would check with the distributor to see if the distributor would break up the set.<sup>186</sup>

Subsequently, Daniels contacted Wehry to inform him that he could purchase the helmet he desired separately from the set, and Wehry instructed Daniels to order the helmet, which Daniels did. Following its arrival, Daniels called Wehry on numerous occasions, and Wehry repeatedly told Daniels that he would be in soon to pick up the helmet. Daniels eventually sued seeking \$2887.50 in damages.<sup>187</sup> At the hearing, Wehry was asked whether he had instructed Daniels to order the helmet for him, and he responded as follows: "At Seventeen

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goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved . . . ." *Insul-Mark Midwest, Inc. v. Modern Materials, Inc.*, 612 N.E.2d 550, 554 (Ind. 1993) (quoting *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974)). The court in *Insul-Mark* adopted the predominant thrust test and rejected the bifurcation approach to handling mixed transactions. *Insul-Mark*, 612 N.E.2d at 554. If the court in *Howland* had applied the predominant thrust test, it might have concluded that the transactions at issue constituted sales of goods covered by Article 2, and if that were the situation, sections 2-401 and 2-501 would have provided the court with additional guidance regarding the title question. See IND. CODE ANN. § 26-1-2-401 and § 26-1-2-501 (West 2003).

183. "Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars (\$500) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought . . . ." IND. CODE ANN. § 26-1-2-201.

184. *Id.* § 26-1-2-201(3)(b) (West 2003).

185. 784 N.E.2d 532 (Ind. Ct. App. 2003).

186. *Id.* at 533.

187. *Id.* at 534. Daniels said that he told Wehry before he ordered the helmet that it would cost \$2750. Wehry said that Daniels did not reveal this price to Wehry until the third phone call that Daniels made to Wehry about picking up the helmet. *Id.* Daniels' claim included the price of the helmet, along with sales tax and court costs. *Id.*



(\$1700.00) Eighteen Hundred Dollars (\$1800.00) yes.”<sup>188</sup> The trial court found for Daniels and awarded him \$2926.50.<sup>189</sup>

Wehry argued that because the contract for sale did not satisfy the requirement that there be a writing under the statute of frauds, it was not enforceable. Daniels contended that, although there was no written contract, their agreement was removed from the writing requirement under the admission exception to the statute of frauds:

A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable . . . if the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted . . . .<sup>190</sup>

Because this was an issue of first impression in Indiana,<sup>191</sup> the court turned to the case law of other jurisdictions. The court noted that it is not necessary that a party literally say, “I admit that I entered into an oral contract.” Instead, it is enough if the party “testified to facts which . . . establish that a contract was formed.”<sup>192</sup> In addition, it is not necessary that the admission encompass all the terms of the contract; rather, it must establish “that the parties did in fact enter into a contractual relationship.”<sup>193</sup> Consequently, the admission does not have to show that the parties agreed upon the price of the goods to be bought and sold.<sup>194</sup>

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188. *Id.* (quoting Hearing Transcript 26).

189. The award included \$2887.50 (the price of the helmet plus sales tax), along with \$39.00 in court costs. *Id.*

190. IND. CODE ANN. § 26-1-2-201(3)(b) (West 2003). The court noted that the purpose underlying this exception is

(1) to provide that a party cannot admit the existence of an oral contract for the sale of goods and simultaneously claim the benefit of the statute of frauds, (2) to prevent the statute of frauds from becoming an aid to fraud, and (3) to expand the exceptions to the nonenforceability of oral contracts under the statute of frauds.

*Wehry*, 784 N.E.2d at 535 (quoting *Quaney v. Tobyne*, 689 P.2d 844, 849 (Kan. 1984) (citations omitted)).

191. “Although we have found no Indiana cases considering what constitutes an admission within the statutory term, courts in other jurisdictions have considered this issue.” *Wehry*, 784 N.E.2d at 535.

192. *Id.* (quoting *Lewis v. Hughes*, 346 A2d. 231 (Md. 1975)).

193. *Id.* at 536 (citing *Jackson v. Meadows*, 264 S.E.2d 503, 505 (Ga. Ct. App. 1980)).

194. *Id.* (citing *Jackson*, 264 S.E.2d at 503). This conclusion comports with other sections of the Uniform Commercial Code. See IND. CODE ANN. § 26-1-2-204(3) (West 2003) (“Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.”); see also *id.* § 26-1-2-305(1) (“The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery . . .”).

In *Cargill, Inc., Commodity Marketing Division v. Hale*,<sup>195</sup> during cross examination, the plaintiff asked the defendant whether the defendant had agreed in a phone conversation to sell soybeans to the plaintiff. "The defendant responded, 'Yes, Sir[,]'"<sup>196</sup> and the court there concluded that this response was an admission under 2-201(3)(b).<sup>197</sup> The court in *Wehry* viewed the facts before it as analogous to the facts in *Cargill*, and it reached the same conclusion as the Missouri court. "Here, Wehry also responded affirmatively when asked if he told Daniels to order the helmet for him. This testimony also constitutes an admission within the meaning of the statute, and the contract is therefore enforceable by Daniels."<sup>198</sup> Finally, the court stated that once it is clear that a contract was formed, the only task remaining is to determine the contract's exact terms.<sup>199</sup> Here, the parties' disagreement over the price term raised a factual issue for the trier of fact, and the court determined that it was not unreasonable for the trier of fact to have determined that Wehry agreed to purchase the 1985 helmet for \$2750.<sup>200</sup> The court of appeals affirmed the lower court's decision in Daniels' favor.

#### *E. Connection of the Writing to the Sale*

One other case addressing writing requirements under the UCC reaffirmed the long-ago-established proposition that there must be a clear connection between the writing and the purported sale of goods in order to satisfy the requirements of the statute of frauds. In *Fillmore LLC v. Fillmore Machine & Tool Co.*,<sup>201</sup> the parties entered into a transfer and sale agreement designed to establish Fillmore LLC.<sup>202</sup> The contract provided that "Innotek was to contribute \$24,000 in cash to Fillmore LLC in exchange for 50% of Fillmore LLC's units. Fillmore was to contribute \$24,000 in accounts receivable to Fillmore LLC in exchange for the other 50% of Fillmore LLC's units."<sup>203</sup> The contract did not mention the transfer of any other assets to Fillmore LLC. Despite this fact, Innotek's accountant, Bruce Buchan, who prepared the tax returns for Fillmore and Fillmore LLC, showed on the returns "a transfer of Fillmore's equipment and real property to Fillmore LLC."<sup>204</sup> Moreover, Buchan was the only person who

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195. 537 S.W.2d 667 (Mo. Ct. App. 1976).

196. *Id.* at 669.

197. *Id.*

198. *Wehry*, 784 N.E.2d at 536.

199. *Id.* (citing *Dangerfield v. Markel*, 222 N.W.2d 373, 378 (N.D. 1974)).

200. *Id.*

201. 783 N.E.2d 1169 (Ind. Ct. App. 2003).

202. *Id.* at 1172.

203. *Id.*

204. *Id.* at 1173.

When questioned about the accounting entries and the tax returns showing a transfer of assets other than \$24,000 in accounts receivable from Fillmore to Fillmore LLC, Buchan stated that he prepared the returns and made the entries to reflect his



testified that an agreement for such a transfer was made.<sup>205</sup>

Fillmore subsequently sued Innotek, alleging that Innotek was liable for conversion of \$275,000 worth of Fillmore's machinery and equipment.<sup>206</sup> The trial court concluded, among other determinations, that the Uniform Commercial Code's statute of frauds precluded "any agreement regarding the transfer of the equipment to Fillmore LLC."<sup>207</sup> In response, Innotek contended, among other things, that the signature of one of Fillmore's principals on the tax return "indicated that the equipment had been transferred and that this was enough to have satisfied the statute of frauds."<sup>208</sup> The court, however, disagreed. Relying on a 1926 case, the court of appeals stated, "Long ago, this court determined that the writing must specifically refer to a sale memorandum or other acknowledgment of a sale—oral testimony will not establish a connection between the writing and the parties' acknowledgment of sale."<sup>209</sup> Here, the tax returns did not specifically refer to an agreement for the sale of Fillmore's equipment to Fillmore LLC, and thus, the statute of frauds was not satisfied.<sup>210</sup> The court of appeals affirmed the lower court's decision.

CONCLUSION

Finally, in addition to the cases discussed here, the Indiana Court of Appeals decided several other cases that Indiana attorneys will find interesting. However, the Indiana Supreme Court has granted requests for transfer in each of those cases, and as of this writing, it has not delivered those opinions. Consequently, readers will have to wait until next year's survey issue of the *Indiana Law Review* for a discussion of those decisions.

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understanding of the parties' discussions [at a meeting preceding the signing of the contract for sale]. Buchan also acknowledged that before preparing the first tax return for Fillmore and Fillmore LLC, he discovered that the transfer and sale agreement . . . reflected a different scenario—one in which Fillmore's contribution to Fillmore LLC was only \$24,000 in accounts receivable—not any and all assets of the company.

*Id.*

205. *Id.* at 1175.

206. *Id.* at 1174.

207. *Id.* at 1178. See *supra* note 183; IND. CODE ANN. § 26-1-2-201 (West 2003).

208. *Fillmore*, 783 N.E.2d at 1178.

209. *Id.* (citing *Warner Sugar Ref. Co. v. Beyer Bros.*, 151 N.E. 739 (Ind. Ct. App. 1926)).

210. *Id.*





# RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

JOEL M. SCHUMM\*

Issues of criminal law and procedure always consume considerable time and energy in the General Assembly and Indiana appellate courts. This year, however, saw considerably more activity in the courts than in the budget-strapped legislature. This survey reviews some of the most significant developments in both venues between October 1, 2002, and September 30, 2003.

## I. A QUIET YEAR ON THE LEGISLATIVE FRONT

When a legislature is faced with tough economic times and budgetary shortfalls, it faces limited options. Enhanced penalties and the creation of new crimes becomes more difficult because more people spending more time in prison, especially when prisons are overcrowded, is not an insignificant budgetary concern.<sup>1</sup> The late-Governor Frank O'Bannon not only recognized this reality but vowed near the end of the 2003 session to veto legislation that significantly increased the number of prison inmates if the General Assembly did not appropriate money to pay for the legislation.<sup>2</sup> Thus, when the General Assembly passed an unfunded bill to stiffen penalties for battery of vulnerable adults, such as those suffering from mental illness or physical disability, O'Bannon vetoed it.<sup>3</sup> When the General Assembly enacted legislation that would have increased sentences for acts of juvenile delinquency and resisting police, O'Bannon held true to his promise and issued another veto.<sup>4</sup>

Nevertheless, bills that either created new crimes, refined old ones, or imposed additional sanctions were enacted and signed into law. Legislators approved and O'Bannon signed legislation that re-classified public indecency offenses.<sup>5</sup> What was once a Class A misdemeanor offense of public indecency<sup>6</sup> was preserved for the more severe incidents in which a person appears in a state of nudity with the intent to arouse the sexual desires of himself or another or has the intent to be seen by a child under the age of sixteen.<sup>7</sup> For seemingly less severe cases, the new offense of "public nudity," a Class C misdemeanor, was created to address instances of nudity without an intent to be seen, such as

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1. See Mary Beth Schneider, *Vetoed Bill Toughened Battery Penalties*, INDIANAPOLIS STAR, May 2, 2003, at B1.

2. *Id.*

3. *Id.*

4. Kevin Corcoran, *Governor Vetoes 5 More Bills*, INDIANAPOLIS STAR, May 10, 2003, at B1.

5. See Schneider, *supra* note 1, at B1 (noting that O'Bannon signed the act because it would not "increase the number of inmates in any significant way").

6. IND. CODE § 35-45-4-1 (Supp. 2002).

7. IND. CODE § 35-45-4-1 (2003).

urinating in public; a Class B misdemeanor for incidents in which the defendant intended to be seen, such as streaking or flashing; and a Class A misdemeanor for those appearing nude on school property, a public park, or Department of Natural Resources (DNR) property.<sup>8</sup>

Another area in which the General Assembly could—and did—act with minimal budgetary impact was in amending the domestic battery statute. The legislation was in apparent response to the Indiana Court of Appeals' decision in *Vaughn v. State*,<sup>9</sup> which found the original statute unconstitutionally vague.<sup>10</sup> The 2003 amendment delineated specific factors for the court to consider in determining whether a battered person was "living as if a spouse," as required for the offense of domestic battery:

- (1) the duration of the relationship;
- (2) the frequency of contact;
- (3) the financial interdependence;
- (4) whether the two (2) individuals are raising children together;
- (5) whether the two (2) individuals have engaged in tasks directed toward maintaining a common household; and
- (6) other factors the court considers relevant.<sup>11</sup>

This amendment seems not only to rectify the constitutional infirmity of the earlier version but also offers useful guidance to counsel, trial courts, and juries in domestic battery cases.

Of course, one legislative session would not be complete without some tough-on-drugs legislation. This year, like other recent ones, the vilified drug was methamphetamine. The statute was amended to criminalize the possession of more than ten grams of certain precursors (ephedrine, pseudoephedrine, phenylpropanolamine or salts, isomers, or combinations of these) as a Class D felony.<sup>12</sup> The offense is a Class C felony if the precursors are possessed while the defendant has a firearm or is within 1,000 feet of school property, a public park, family housing complex, or a youth program center.<sup>13</sup> Exceptions were included for pharmacists, health care providers, retailers, etc., if the possession is in the usual course of their lawful business activities.<sup>14</sup>

However, the session was not entirely tough on crime. For example, new procedures for reducing Class D felonies to Class A misdemeanors—alternative misdemeanor sentencing (AMS in criminal practice parlance)—were adopted. The basic requirements are pleading guilty, agreeing to all conditions, and securing prosecutorial consent.<sup>15</sup> In addition, only certain D felony offenses are

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8. *Id.* § 35-45-4-1.5.

9. 782 N.E.2d 417 (Ind. Ct. App. 2003).

10. *Id.* at 420-21.

11. IND. CODE § 35-42-2-1.3(b) (2003).

12. *Id.* § 35-48-4-14.5(b).

13. *Id.*

14. *Id.* § 35-48-4-14.5(d).

15. *Id.* § 35-38-1-1.5.



eligible; auto theft and receiving stolen auto parts are no longer ineligible offenses while possession of child pornography is ineligible.<sup>16</sup> If all of the conditions are met, the conversion is required; however, the court has discretion not to convert the offense if the defendant violates or fails to perform a condition.<sup>17</sup> Conversion is prohibited if the defendant commits a new offense prior to conversion.<sup>18</sup>

Further easing the burden on Indiana's prisons and jails, the home detention statute was amended to allow participation by those convicted of sex offenses under section 35-46-1-3 of the Indiana Code if the offender is supervised by a court-approved home detention program and the conditions include twenty-four-hour-per-day supervision.<sup>19</sup> Finally, legislation was approved to create a new fifteen-member committee to study the classifications of all crimes and correction issues, submitting a final report by November 1, 2004.<sup>20</sup> This is likely to lead to recommendations that some offense classifications be lessened, while others be increased. A systematic review of all offenses—rather than the piecemeal tinkering that occurs each year—is long overdue and certainly worth the minimal cost.

## II. PLENTY OF ACTION IN THE APPELLATE COURTS

The Indiana Supreme Court and Court of Appeals issued opinions addressing a wide variety of issues. Some resolved old conflicts while others created new ones.

### A. Death Penalty Redux

As discussed in last year's survey, Indiana's death penalty statute and recent Indiana Supreme Court authority are in a bit of disarray.<sup>21</sup> It is a risky endeavor to anticipate what the United States Supreme Court might do in a case—even after it has heard oral argument—but the Indiana Supreme Court took the risk in *Saylor v. State*<sup>22</sup>—and got it wrong.<sup>23</sup> Within a few months of the mistake coming to light, the Court signaled its apparent openness to rectifying *Saylor* by taking the highly unusual step of holding oral argument on a petition for rehearing in November of 2002.<sup>24</sup> However, nearly a year later as the survey period ended, the court had not issued an opinion on rehearing in *Saylor*. Because Indiana's death penalty statute remains riddled with problems and

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16. *Id.* § 35-50-2-7.

17. *Id.* § 35-38-1-1.5.

18. *Id.*

19. *Id.* § 35-38-2.5-5.7.

20. 2003 Ind. Acts 1055, Pub. L. 140-2003 § 1.

21. See Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 36 IND. L. REV. 1003, 1003-13 (2003).

22. 765 N.E.2d 535 (Ind. 2002).

23. Schumm, *supra* note 21, at 1008.

24. *Id.* The oral argument can be accessed on the Indiana Supreme Court's website.

Indiana decisional law remains at odds with clear United States Supreme Court precedent,<sup>25</sup> one might have expected a decision within a few months—or at least within a year. The Court has not squared *Ring v. Arizona*<sup>26</sup> with its opinions or the Indiana statute, and thus trial courts, prosecutors, and defense attorneys around the State have little idea how to instruct juries and sentence defendants consistent with *Ring*.

If the United States Supreme Court, with nine members and plenty of healthy egos, can routinely issue opinions on issues of considerable complexity and importance within a few months of argument, one is left to wonder the source of delay at the Indiana Supreme Court. There is arguably more harmony and collegiality at the Indiana Supreme Court, and unanimous decisions—a rarity with the Big Court in DC—are quite common.<sup>27</sup> Nevertheless, there is no reason to believe that collegiality would be diminished if the court, like the Supreme Court, heard and decided cases within, for example, an October to June term. The benefits to litigants, practitioners, and trial court judges, especially in this area, would be considerable.<sup>28</sup>

Although the Court did not venture into the murky waters of *Ring*, it did address the death penalty in a few other contexts. It issued unanimous opinions ordering a new trial for a defendant who had invoked his right to remain silent during a videotaped interview with police that was played in its entirety for the jury<sup>29</sup> and affirmed a rare grant of post-conviction relief for a death-row inmate who was convicted by a jury with a member who later admitted that she lied during voir dire.<sup>30</sup>

The court was not always in agreement on issues regarding the death penalty, and issues relating to mental retardation and DNA testing provoked some disagreement. The two July death penalty decisions were 3-2, with Justices Boehm and Rucker dissenting in both. This may signal a developing trend in which the two newest members of the Court are the most skeptical of cases in which a death sentence is imposed.<sup>31</sup>

1. *Mental Retardation*.—After Howard Allen's death sentence had been affirmed on direct appeal and on appeal from the denial of his petition for post-

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25. *Id.* at 1009-13.

26. 536 U.S. 584 (2002).

27. See generally Kevin W. Betz & P. Jason Stephenson, *Supreme Court Review: An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 2002*, 36 IND. L. REV. 919 (2003).

28. Arguably a defendant charged with a capital crime or currently under a death sentence would benefit from delay that, at a minimum, continues his or her life. The psychological effects of being in that situation, however, are not insignificant but are well beyond the scope of this Article. Oddly enough, Indiana statutory law specifically provides for expedited appeals in capital cases. See IND. CODE § 35-50-2-9(j) (2003).

29. *Kubsch v. State*, 784 N.E.2d 905 (Ind. 2003).

30. *Dye v. State*, 784 N.E.2d 469 (Ind. 2003).

31. See also *Daniels v. State*, 741 N.E.2d 1177, 1191-95 (Ind. 2001) (Boehm, J., joined by Rucker, J., dissenting).



conviction relief, he requested permission to litigate the additional post-conviction claim that he is a mentally retarded person whose execution is prohibited by *Atkins v. Virginia*.<sup>32</sup> The three-justice majority denied Allen's request, finding that "the trial court adequately considered the evidence of mental retardation" when it was addressed as a possible mitigating circumstance at sentencing.<sup>33</sup> The majority reasoned that *Atkins*, applied to Indiana's sentencing scheme, requires that "the mitigating circumstance of mental retardation necessarily outweighs any death-eligible aggravating circumstance."<sup>34</sup>

Justice Boehm, joined by Justice Rucker, dissented. He reasoned that "both the sentencing judge and the fact-finder in a pre-*Atkins* regime were confronted with different considerations in evaluating mental retardation as a mitigating circumstance as opposed to a complete bar to execution."<sup>35</sup> In his view, the Eighth Amendment, under *Atkins*, presents Indiana courts "with a binary decision: either Allen is or is not mentally retarded."<sup>36</sup> In 1996 the trial court addressed a different issue of the balancing of aggravating and mitigating circumstances, and its findings did not adjudicate the Eighth Amendment issue or make findings that met Eighth Amendment standards.<sup>37</sup>

2. *DNA Evidence*.—Days before his scheduled execution, Darnell Williams filed a "Petition For the Consideration of New Evidence Pursuant to Indiana Code 35-50-2-9(k)."<sup>38</sup> That statute, enacted effective July 1, 2003, applies to death penalty cases involving "previously undiscovered evidence" after the completion of post-conviction review.<sup>39</sup> Of particular note, Williams requested that DNA testing be performed on blood spots on the shorts he was wearing when arrested.<sup>40</sup> However, because the issue was addressed at length in a June 27 order and therefore not "previously undiscovered," the court rejected Williams' claim.<sup>41</sup> Justice Sullivan wrote the majority's opinion and was joined by the Chief Justice and Justice Dickson.<sup>42</sup>

Justice Boehm and Justice Rucker each filed dissenting opinions. Justice Boehm reasoned that DNA analysis of the blood found on Williams' shorts had not been performed and, if performed, would therefore "obviously be undiscovered."<sup>43</sup> He noted that the blood on the shorts was cited at trial as evidence that Williams was in the room and close to at least one of the victims

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32. 536 U.S. 304 (2002); see *Allen v. State*, 49S00-0303-SD-122, 2003 Ind. LEXIS 581 (Ind. July 15, 2003)

33. *Allen*, 2003 Ind. LEXIS 581, at \*14.

34. *Id.* at \*12.

35. *Id.* at \*17.

36. *Id.* at \*16.

37. *Id.* at \*17.

38. See *Williams v. State*, 793 N.E.2d 1019, 1021 (Ind. 2003).

39. *Id.* (quoting IND. CODE § 35-50-2-9(k) (2003)).

40. *Id.* at 1024.

41. *Id.*

42. *Id.*

43. *Id.* at 1030 (Boehm, J., dissenting).

when the shots were fired. Because Williams was jointly charged with a co-defendant, proof that Williams had the victim's blood on his clothing would be "powerful in tipping th[e] balance" in favor of a death sentence because it establishes far more than his accomplice liability as a participant in a felony murder.<sup>44</sup> The best available blood test at the time of trial confirmed that the blood was consistent with that of the victims and 41% of the population at large.<sup>45</sup> But modern DNA technology would "establish beyond any reasonable doubt that the blood was or was not from the victims," and Justice Boehm concluded that testing should be allowed because "the cost to the public in either expense or delay seems minimal in relation to the benefit of confidence in the verdict."<sup>46</sup>

Justice Rucker agreed that if the blood on Williams' clothing proved not to be from the victims he would remand for a new penalty phase.<sup>47</sup> He noted that at trial both the State and defense "put a great deal of credence on what has been characterized as the 'blood evidence,'" and that the trial court considered the evidence "significant" in imposing the death sentence.<sup>48</sup> He similarly pointed to "confidence in the judicial system" as a reason for postponing the execution, succinctly noting that "[d]eath is different."<sup>49</sup>

The Indiana Supreme Court's opinion in *Williams* was issued on July 25. Four days later in "an unprecedented move," Governor O'Bannon issued a stay of execution to allow for DNA testing.<sup>50</sup> Acknowledging that the case had been reviewed by Indiana and federal courts, the Governor's statement observed that the stay was necessary "[i]n the unique circumstances of this case" and would "permit all potentially relevant evidence to be discovered."<sup>51</sup>

Indeed, death is different, and the pair of July decisions in *Allen* and *Williams*, coupled with the unanimous opinions mentioned above, suggests that the Court—or at least two of its members in particular—may be taking a harder look at death penalty cases. The *Ring* concerns loom, however, and it seems possible that Indiana's death row may continue to shrink—not because of executions but because of judicial action by either the Indiana Supreme Court or federal court on habeas review.

### *B. Mens Rea for Child Molest*

In a pair of decisions issued in November of 2002, the Indiana Supreme Court clarified the intent requirement for a child molesting conviction in two

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44. *Id.* at 1031 (Boehm, J., dissenting).

45. *Id.* (Boehm, J., dissenting).

46. *Id.* at 1032 (Boehm, J., dissenting).

47. *Id.* at 1033 (Boehm, J., dissenting).

48. *Id.* (Rucker, J., dissenting).

49. *Id.* (Rucker, J., dissenting).

50. Fred Kelly, *Governor Stalls Execution; DNA Will Be Tested*, INDIANAPOLIS STAR, July 29, 2003, at A1.

51. *Id.*



important respects. First, in *Louallen v. State*,<sup>52</sup> the court granted transfer to address the required level of mental culpability for a Class C felony child molesting (fondling) conviction. The defendant argued that the language of the statute, which required fondling or touching “with intent to arouse or to satisfy . . . sexual desires,” had the effect of requiring the fondling element be performed “intentionally”—and not merely “knowingly.”<sup>53</sup> Because the trial court instructed the jury that a conviction could be based on conduct performed “knowingly or intentionally,” the defendant asserted that the instruction constituted fundamental error.<sup>54</sup> He relied on section 35-41-2-2(d) of the Indiana Code, which mandates that the same level of mental culpability is required for all elements of an offense unless the statute specifically provides otherwise. But the supreme court held that the language of section 2(d) does not require an “intentional” mental culpability with respect to every element of child molesting:

[A]n “intentional” mental state is not required by the child molesting statute for commission of the offense, only for a single element of the offense. There is nothing in Ind. Code § 35-41-2-2(d) to suggest that the Legislature intended it to work in the opposite direction than it is written, i.e., nothing to suggest that the Legislature intended that if a kind of culpability is required for one (but only one) material element of the prohibited conduct, it is required for commission of the offense and every material element of it.<sup>55</sup>

Therefore, the trial court committed no error in instructing the jury.<sup>56</sup>

In *D’Paffo v. State*,<sup>57</sup> the court held that the State is not required to prove intent to arouse or satisfy sexual desires in order to obtain a conviction for child molesting by deviate sexual conduct. The child-molesting-by-fondling-or-touching statute<sup>58</sup> contains language requiring that the defendant perform or submit to conduct with “intent to arouse or satisfy the sexual desires” of defendant or the child, but that language is not found in the statute criminalizing child molesting by sexual intercourse or deviate sexual conduct.<sup>59</sup> In light of the statutory structure, the court declined to require the “intent to arouse the sexual desires” in any statutory crime in which the language was not expressly set forth.<sup>60</sup> Nevertheless, the court noted that if

the evidence warrants an inference that an alleged penetration of the sex organ or anus of a person by an object was in furtherance of a bona fide

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52. 778 N.E.2d 794 (Ind. 2002).

53. *Id.* at 795-96.

54. *Id.* at 796.

55. *Id.* at 798.

56. *Id.*

57. 778 N.E.2d 798 (Ind. 2002).

58. See IND. CODE § 35-42-4-3(b) (2003).

59. *Id.*; see also *D’Paffo*, 778 N.E.2d at 800.

60. *D’Paffo*, 778 N.E.2d at 801.

medical or personal hygiene-related examination or procedure, we believe that defendant would be entitled to an appropriate instruction as to criminal intent.<sup>61</sup>

Because no such issue was presented in this case, the trial court did not err in failing to instruct the jury that the intent to arouse was required.

*Louallen* and *D'Paffo* certainly offer important guidance for counsel and trial courts in instructing juries. Considering the nature of child molesting trials, which are often credibility contests, it is unlikely that the opinions will make much practical difference, especially in light of the other significant instructional development discussed in Part II.C below.

### C. *The Best Instructions Say the Least?*

Last year's survey noted a trend of simplifying jury instructions by prohibiting those that emphasize certain evidence and confuse or have the potential to confuse the jury.<sup>62</sup> This year, yet another instruction was put on the supreme court's chopping block. As presaged by Justice Dickson's dissent from the denial of transfer last year in *Carie v. State*,<sup>63</sup> the supreme court in *Ludy v. State*<sup>64</sup> unanimously disapproved the future use of the following instruction: "A conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt."<sup>65</sup> Consistent with the reasoning of the dissent from denial of transfer in *Carie* just months earlier, the court found fault with the instruction on at least three grounds: (1) it unfairly focused the jury's attention on and highlighted a single witness's testimony; (2) it presented a concept used in appellate review that is irrelevant to the jury's fact-finding function; and (3) it may mislead or confuse the jury through the use of the technical term "uncorroborated."<sup>66</sup> The court disapproved several cases spanning twenty years<sup>67</sup> and held that the "new rule" would apply to cases pending on direct appeal in which the instructional error was preserved.<sup>68</sup> Nevertheless, the court affirmed *Ludy*'s conviction because the instructional error was harmless, i.e., it did not affect his substantial rights.<sup>69</sup> Specifically, the testimony of the victim was not uncorroborated; it was corroborated by the testimony of another person and by physical injuries to the defendant, who had been beaten in his jail cell and anally penetrated with a bottle of "hot sauce."<sup>70</sup>

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61. *Id.* at 802.

62. *See* Schumm, *supra* note 21, at 1021.

63. 761 N.E.2d 385 (Ind. 2002).

64. 784 N.E.2d 459 (Ind. 2003).

65. *Id.* at 460.

66. *Id.* at 461.

67. *See id.* at 462 n.2.

68. *Id.* at 462.

69. *Id.* at 462 (citing IND. TRIAL R. 61).

70. *Id.* at 462-63.



In the weeks and months after *Ludy*, the court of appeals decided several cases in the appellate pipeline in which similarly worded instructions had been given. For example, in *Tinkham v. State*,<sup>71</sup> the court reversed a conviction even though the instruction referred to the uncorroborated testimony of a “witness” rather than “alleged victim.”<sup>72</sup> The instruction was not cured by other instructions, and the error was not harmless because the victim’s testimony was not corroborated by any other testimony or physical evidence.<sup>73</sup> Similarly, in *Anderson v. State*,<sup>74</sup> the court granted rehearing and reversed a child molesting conviction in a case decided the day before *Ludy* had been handed down. There, the child’s testimony had been corroborated only by people who recounted or repeated accounts of the incident told to them by the child.<sup>75</sup> Finally, in *Bayes v. State*,<sup>76</sup> the court reversed a conviction in a case in which the instruction highlighted the testimony of two witnesses rather than one.<sup>77</sup> The only bar to reversal—absent harmless error found in *Ludy* itself—was seemingly a failure to object to the instruction at trial.<sup>78</sup>

#### *D. Polygraphs Admonishment*

Instructional fever continued, as the Indiana Court of Appeals offered useful guidance to trial courts confronted with a witness’ improper reference to polygraphs. Although the unreliability of polygraphs may be axiomatic, so is the infrequency of appellate reversal based on a claim that the trial court should have declared a mistrial. When a witness makes an oblique reference to a polygraph, the trial court’s decision not to declare a mistrial is usually affirmed on appeal in relatively short order. Although the court of appeals affirmed in *Glenn v. State*,<sup>79</sup> the opinion is nevertheless noteworthy because it offers a thoughtful suggestion for trial courts dealing with such issues in the future.

In the course of questioning a witness about her communications with the detective who investigated the murder with which Glenn was charged, defense counsel asked the witness to pinpoint the precise time she had given a recorded statement. The witness answered that it was the “second or third time” but continued with a reference to a “polygraph test” during the first statement.<sup>80</sup> The trial court dismissed the jury, and Glenn moved for a mistrial, arguing that no admonishment could correct the jury’s impression that the witness had taken and

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71. 787 N.E.2d 440 (Ind. Ct. App. 2003).

72. *Id.* at 442.

73. *Id.* at 443.

74. 790 N.E.2d 146 (Ind. Ct. App. 2003).

75. *Id.* at 147.

76. 791 N.E.2d 263 (Ind. Ct. App. 2003).

77. *Id.* at 265.

78. See *Manuel v. State*, 793 N.E.2d 1215 (Ind. Ct. App. 2003).

79. 796 N.E.2d 322 (Ind. Ct. App. 2003).

80. *Id.* at 324.

passed a polygraph test.<sup>81</sup> The trial court denied the motion for mistrial, admonished the witness that she was not to use the word "polygraph" or "lie detector" in her testimony, and after the jury was returned to the courtroom instructed the jurors to "disregard the witness's last remark . . . ."<sup>82</sup>

In affirming the convictions, the court of appeals reiterated the long-standing principle that "a mistrial is an extreme remedy used only when no other curative measure will rectify the situation."<sup>83</sup> Here, the court found that Glenn "may have invited the error" when defense counsel asked the witness to pinpoint the time she had given the statement to police.<sup>84</sup> In addition, the court agreed with the trial court's finding that the witness's remark "was not intentional and that there was no mention of the test results."<sup>85</sup> Finally, the comment did not make specific reference to a particular case, and the jury was aware that the witness had several cases pending for other offenses.<sup>86</sup>

Although the court found the trial court's general admonishment sufficient, it observed that "juries may be more likely to adhere to an admonishment or limiting instruction if the trial judge would go one step further and inform them of the reason for disregarding the inadmissible evidence."<sup>87</sup> Therefore, the court of appeals suggested that trial judges give the following admonishment when the issue arises in the future:

A suggestion has been made that the witness took a polygraph examination, yet there has been no suggestion as to what the subject matter of the polygraph test was. Because scientific research has found that polygraph tests are not reliable, they are inadmissible. I would ask that you disregard the last comment made by the witness.<sup>88</sup>

Acknowledging that no instruction is "fail-safe," the court aptly noted that this specific admonishment may serve to mitigate the harmful effect of a polygraph reference in future cases. Although seemingly bucking the less-is-better instructional trend of the Indiana Supreme Court, the court of appeals' opinion is a useful one that trial courts will hopefully heed in the future.

#### *E. Jury Nullification*

Perhaps the most significant—or at least the most fundamental—development in the instructional realm was the supreme court's decision regarding the meaning of the seemingly straightforward language of article I, section 19 of the Indiana Constitution, which allows juries to determine not only

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81. *Id.*

82. *Id.*

83. *Id.* at 325.

84. *Id.*

85. *Id.*

86. *Id.* at 324-25.

87. *Id.* at 325.

88. *Id.* at 326.



the facts but also "the law" in Indiana.<sup>89</sup> In *Holden v. State*,<sup>90</sup> the court considered the propriety of an instruction that told juries this provision "does not entitle you to return false verdicts, it does allow you the latitude to refuse to enforce the law's harshness when justice so requires."<sup>91</sup> In a seven-paragraph opinion, the court upheld the trial court's refusal of the instruction. Citing two Indiana cases and several law review articles, the court concluded

Although there may be some value in instructing Indiana jurors that they have a right to "refuse to enforce the law's harshness when justice so requires," the source of that right cannot be found in Article I, Section 19 of the Indiana Constitution. This Court's latest pronouncement on the subject is correct: "[I]t is improper for a court to instruct a jury that they have a right to disregard the law. Notwithstanding Article 1, Section 19 of the Indiana Constitution, a jury has no more right to ignore the law than it has to ignore the facts in a case."<sup>92</sup>

The decision, especially in light of its authorship, was a bit of a surprise. Just four years earlier, then-Judge Rucker of the Indiana Court of Appeals had written a law review article taking a far more expansive view of article I, section 19.<sup>93</sup> In the article, he opined that "an instruction telling the jury that the constitution intentionally allows them latitude to 'refuse to enforce the law's harshness when justice so requires' would be consistent with the intent of the framers and give life to what is now a dead letter provision."<sup>94</sup> His unanimous opinion for the court just four years later, however, seems to have effectively shut that door.

Although the opinion makes clear that trial courts need not instruct jurors that they may "disregard" or "refuse to enforce the law's harshness," it appears to leave open the possibility that an instruction that otherwise highlights the juror's ability to decide the law, without explicitly telling them that they may disregard it, may be upheld under section 19.<sup>95</sup> Indeed, the court quotes the language of an instruction approved over a century ago:

You, gentlemen, in this case, are the judges of law as well as of the facts. You can take the law as given and explained to you by the court, but, if you see fit, you have the legal and constitutional right to reject the same, and construe it for yourselves.<sup>96</sup>

It would appear that defendants could tender instructions with this language or

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89. IND. CONST. art. I, § 19.

90. 788 N.E.2d 1253 (Ind. 2003).

91. *Id.* at 1254.

92. *Id.* (citing *Bivins v. State*, 642 N.E.2d 928, 946 (Ind. 1994)).

93. See Honorable Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 VAL. U. L. REV. 449 (1999).

94. *Id.* at 481 (footnote omitted).

95. *Holden*, 788 N.E.2d at 1254.

96. *Id.* (citing *Blaker v. State*, 29 N.E. 1077 (Ind. 1892)).

some variation between it and the *Holden* instruction. Concerns also loom about the extent to which a jury's role in deciding "the law" may be mentioned during voir dire or closing argument, which means the issue is likely to resurface on the appellate docket.

*F. Waiver? What, When, and How . . .*

The appellate courts in Indiana have long used the term "waiver" in a number of different contexts certain to engender some degree of confusion. The Indiana Supreme Court confronted two of these in *Bunch v. State*.<sup>97</sup> Bunch was convicted of several counts of dealing cocaine. One of his convictions was vacated on appeal, but he did not raise any sentencing claims. He later filed a petition for post-conviction relief, which was denied; it raised no sentencing claims. Finally, he secured permission to file a successive petition for post-conviction relief that alleged the trial court had improperly weighed the aggravating and mitigating circumstances in sentencing him, and that petition was denied as well. Although the State had filed a response asserting the affirmative defense of waiver, it did not raise the issue at the post-conviction hearing or attempt to establish the defense "either by evidence or by requesting judicial notice of the issues presented in Bunch's direct appeal."<sup>98</sup> Because of the State's inaction, and in light of longstanding precedent and Trial Rule 8(C), the supreme court held that the State was not entitled to a finding of waiver "as a matter of right."<sup>99</sup>

Nevertheless, the court affirmed the denial of post-conviction under a different species of the "waiver" beast: procedural default. The court acknowledged that it has often used the term "waiver" to explain "the discretionary judicial doctrine that forecloses an issue on appeal" and is more appropriately described as "procedural default" or "forfeiture."<sup>100</sup> This type of "waiver" may be invoked *sua sponte* by an appellate court to find an issue foreclosed "under a variety of circumstances in which a party has failed to take the necessary steps to preserve the issue."<sup>101</sup> In light of long-standing precedent that "claims available on direct appeal but not presented are not available on post-conviction review," the court held that Bunch was foreclosed from raising his sentencing challenge in a post-conviction proceeding.<sup>102</sup>

*Bunch* is significant because it clarifies the confusion often surrounding the seemingly ubiquitous term "waiver." Although the use of the terms "procedural default" or "forfeiture" would be desirable in the future, the court appears unwilling to mandate such a change.

Citing *Bunch*, the court of appeals broke new and dangerous ground in

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97. 778 N.E.2d 1285 (Ind. 2002).

98. *Id.* at 1289.

99. *Id.*

100. *Id.* at 1287.

101. *Id.*

102. *Id.* at 1289.



*Taylor v. State*,<sup>103</sup> when it held that a defendant who pleads guilty must challenge his sentence on direct appeal and may not wait to raise the claim in a petition for post-conviction relief. The key difference between the two cases is that the defendant in *Bunch* was convicted after a trial and Taylor pleaded guilty. The court acknowledged the distinction but found it not to be significant.

Taylor admits that he filed no direct appeal, and we can discern no difference between this situation and one in which a defendant does file a direct appeal, but fails to present an issue to the court. The fact remains that the sentencing issue *could have been* presented upon direct appeal but was not.<sup>104</sup>

Although the court of appeals approach is certainly legally supportable, significant concerns surround its practical effect. Trial courts are not required to advise criminal defendants who plead guilty of their right to appeal their sentences. However, if the court of appeals' opinion stands, one would expect counsel (or trial courts) to advise defendants who plead guilty<sup>105</sup> that they should appeal their sentences or face the possibility of waiver down the road. This would lead to a large increase in the number of direct appeals, which would not only burden the court of appeals docket but would also cost counties a great deal of money to pay for appellate counsel and transcripts.<sup>106</sup>

Moreover, if defendants do not pursue a direct appeal of their sentence immediately after their guilty pleas, it is quite likely that they could do so later in a manner that would cause further delay and cost. If a sentencing issue were discovered in the course of investigating post-conviction relief issues, petitioners could dismiss their petition without prejudice and pursue a belated direct appeal.<sup>107</sup> After the resolution of the direct appeal, the petitioner could then reinstitute the post-conviction relief petition. The net result would be considerable delay and two separate appeals instead of one. Because the issues surrounding the guilty plea offer the possibility of greater relief—vacating an entire conviction rather than reduction of a sentence—it seems preferable that the conviction-based issues be pursued sooner rather than later in the process.

There may be a silver lining in the seemingly dark cloud of *Taylor*. The court concludes its opinion with Taylor's contention that it is improper to impose the doctrine of waiver on him because the trial court was not required to advise

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103. 780 N.E.2d 430 (Ind. Ct. App. 2002).

104. *Id.* at 435 (emphasis in original).

105. This discussion is limited to defendants who plead guilty pursuant to a plea agreement that gives the trial court discretion at sentencing. Plea agreements that require a specific term of years would preclude any appellate challenge to the sentence imposed.

106. The Appellate Division of the Marion County Public Defender Agency joined the Lake County Public Defender Agency in filing an amicus brief in support of transfer in *Taylor*. They opined that the increase in direct appeals of discretionary sentences likely to occur as a result of *Taylor* could easily double their already over-extended budgets.

107. See IND. POST-CONVICTION R. 2.

him of his right to appeal his sentence.<sup>108</sup> The court rejected this argument because Taylor was advised of his right to appeal his sentence.<sup>109</sup> Therefore, in a future case in which there was no appeal advisement, the court might find *Taylor* distinguishable and not apply waiver.

Whether or not the court refines *Taylor* in light of the advisement provided at sentencing, concerns will persist. What should a trial judge do after accepting a guilty plea that grants some discretion at sentencing? What should defense counsel do?

Although there are certainly differences around the state, the usual practice of trial courts, consistent with the Benchbook, appears to be to advise defendants who plead guilty that they are waiving their right to appeal a *conviction*. If the trial court also were to advise these defendants of their right to appeal the sentence, it is likely that the number of sentencing appeals would skyrocket. However, if no advisement were offered, the court of appeals might distinguish *Taylor* and allow the sentencing claim to be raised on post-conviction. There would remain considerable uncertainty, and trial courts and defense counsel may err on the side of full disclosure, advising all defendants of their right to appeal their sentences.

There should be consistent rules governing the timing of sentencing appeals instead of leaving the matter solely within the hands of trial judges based on the advisement given at sentencing. A better course might be one similar to the approach adopted in the ineffective assistance of counsel context in *Woods v. State*:<sup>110</sup> Give defense counsel the primary role in the process. In *Woods*, the Indiana Supreme Court held that a claim of ineffective assistance may be raised on direct appeal but would then be foreclosed in a post-conviction proceeding; if it is not raised on direct appeal—and the court strongly counseled against raising all but clear claims supported by the record on direct appeal—then the issue may still be developed and raised on post-conviction relief.<sup>111</sup> Similarly, in the *Taylor* context, if there appears to be a meritorious sentencing claim, counsel should advise the client of the right to appeal and pursue it immediately. If the sentencing issue is not pursued on direct appeal (regardless of what advisement(s) may have or have not been provided), it should nevertheless remain available on post-conviction.

### G. Still No Issues?

Criminal defendants are doing well if they bat about .150 in the Indiana Court of Appeals.<sup>112</sup> There are a variety of plausible explanations: a defendant's

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108. *Taylor*, 780 N.E.2d at 435.

109. *Id.*

110. 701 N.E.2d 1208 (Ind. 1998).

111. *Id.*

112. In 2002, the Indiana Court of Appeals affirmed 86% of direct criminal appeals and 83.1% of post-conviction relief appeals. See INDIANA COURT OF APPEALS 2002 ANNUAL REPORT 38, available at <http://www.in.gov/judiciary/appeals/docs/2002report.pdf>.



right to an appeal at public expense encourages appeals regardless of their merit, the appellate standards of review and doctrines of waiver and harmless error make reversal difficult, trial courts and attorneys are doing a great job at trial—leaving little to challenge on appeal, and so on.

The practical reality is that appellate public defenders will sometimes be faced with a record seemingly devoid of reversible error. For decades, most have made the best of the situation with some innovation rather than resignation. Chances are that something went wrong either at trial or sentencing—or both, under existing Indiana law; moreover, well-established rules could also be challenged in light of precedent from other states. If all else fails, the old standby of sufficiency of the evidence is usually a viable option, although it rarely proves successful.

In *Packer v. State*,<sup>113</sup> the court of appeals signaled a potential beginning of a new era with different rules and uncertainty for appellate public defenders, their clients, and the court itself. In *Packer*, the public defender in a probation revocation appeal briefed two “issues,” oddly phrased as his inability to “construct a non-frivolous argument” as to each issue.<sup>114</sup> The brief concluded with a statement that “a prayer for relief seems out of place” because of the inability to construct any non-frivolous argument.<sup>115</sup>

The Appellant’s Brief in *Packer* drew the ire of the court of appeals, which noted that there was no suggestion that counsel had discussed the positions to be taken in the brief with his client.<sup>116</sup> Moreover, the positions taken raised concerns under the Indiana Rules of Professional Conduct, specifically the rules concerning competence<sup>117</sup> and zealous advocacy.<sup>118</sup> The court *sua sponte* adopted an alternative approach for counsel faced with a similar situation in the future:

“[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel’s brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel’s request to withdraw and dismiss the appeal . . . . On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the

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113. 777 N.E.2d 733 (Ind. Ct. App. 2002).

114. *Id.* at 736.

115. *Id.*

116. *Id.*

117. IND. PROF’L CONDUCT R. 1.1.

118. IND. PROF’L CONDUCT R. 1.3.

assistance of counsel to argue the appeal.”<sup>119</sup>

This so-called *Anders* briefing has been a staple of federal appellate practice for a quarter of a century, and some states have employed similar approaches.<sup>120</sup>

However, *Anders* was never adopted as a matter of Indiana state law, and some precedent—unmentioned by the court of appeals in *Packer*—and practical considerations suggests that there may be good reason for this. The court of appeals rejected the *Anders* approach for post-conviction proceedings as early as 1972 in *Dixon v. State*,<sup>121</sup> where the court instead adopted the ABA Standards.<sup>122</sup> Five years later, the court of appeals, citing *Dixon*, denied counsel’s motion to withdraw in a direct appeal.<sup>123</sup> These opinions are seemingly consistent with article VII, section 6 of the Indiana Constitution, which affords “in all cases an absolute right to one appeal.”<sup>124</sup> If the right belongs to the client, it is presumably the client—not the attorney—who must waive it.

Although *Packer* makes much of the Rules of Professional Conduct, the rules taken as a whole suggest that *Anders* briefing may not be the best course. First, Rule 3.3(a) requires candor toward the tribunal but this relates only to prohibitions against making false statements of law or fact, failing to disclose binding “directly adverse” authority, and offering evidence known to be false.<sup>125</sup> The more salient rules—competent and zealous representation, as discussed above—coupled with the scope of representation<sup>126</sup> seem to far outweigh any concerns under Rule 3.3(a), which pose little obstacle to diligent and innovative counsel. Perhaps most troubling are the post-conviction relief concerns raised by following an *Anders* approach. A petitioner in a post-conviction relief proceeding is precluded from raising issues known and available on direct appeal.<sup>127</sup> Filing an *Anders* brief seems to doubly seal a defendant’s fate, both on the direct appeal and on post-conviction relief.

*Packer* was essentially decided sua sponte without the benefit of arguments from either the Defendant or State in the case—or the broader defense and prosecution bar through amicus briefs. It does not purport to limit itself to probation revocation appeals, and the *Anders* preference would seemingly apply to criminal direct appeals and juvenile appeals. Finally, because transfer was not sought, the Indiana Supreme Court has not had an opportunity to consider the merits of *Anders* briefing in Indiana.

It seems unlikely that a re-examination of *Packer* will come anytime soon.

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119. *Packer*, 777 N.E.2d at 737 (quoting *Anders v. California*, 386 U.S. 738, 744 (1967)).

120. See generally Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection is More Equal than Others*, 23 FLA. ST. U. L. REV. 625 (1996).

121. 284 N.E.2d 102 (Ind. Ct. App. 1972).

122. *Id.* at 105-06.

123. *Smith v. State*, 363 N.E.2d 1295 (Ind. Ct. App. 1977).

124. IND. CONST. art. VII, § 6.

125. IND. PROF'L CONDUCT R. 3.3(a).

126. IND. PROF'L CONDUCT R. 1.2.

127. See generally *Bunch v. State*, 778 N.E.2d 1285 (Ind. 2002).



There is simply no mechanism for a defendant to challenge the merits of *Packer*. Moreover, it seems unlikely that the court of appeals would issue an opinion criticizing counsel for not filing a *Packer* brief. There will almost always be a plausible, non-frivolous challenge available in any appeal; it might be something as basic as a sentencing irregularity or a trial error that ultimately proves harmless, but there will be something. If the Indiana Supreme Court wishes to give its seal of approval to *Anders* briefing, it could easily do so—but to date has not. The court could, as it did with the Post-Conviction Relief Rules, adopt a provision for counsel to withdraw when an appeal has no merit.<sup>128</sup> Moreover, the court could—and should if it wants to bless the *Packer* approach—amend the appellate rules to offer an alternative to the rule governing the “Appellant’s Brief,”<sup>129</sup> which proscribes that the brief include “contentions why the trial court . . . committed reversible error.”<sup>130</sup> In any event, *Anders* briefing would impose no small burden on the appellate court, which must engage in a “full examination of all the proceedings” for arguable legal points.<sup>131</sup> Upon further reflection, other panels of the court may see the wisdom of the time-tested approach in which counsel raises the best claims he or she can find and advance in each appeal.

#### H. Appellate Sentence Review

This year’s survey ends, as has become a tradition, with a discussion of substantive appellate sentence review.<sup>132</sup> As was suggested last year, the amendment of Appellate Rule 7(B), effective January 1, 2003, to allow the revision of “inappropriate” rather than “manifestly unreasonable” sentences appears to have been a “significant relaxing of the standard . . . .”<sup>133</sup> The court of appeals began applying the relaxed standard in January,<sup>134</sup> and its application spawned thirty-five cases in the first nine months of 2003 alone. Reviewing all of these cases could be a survey article in itself. Therefore, this survey will review only a handful of the cases, paying particular attention to the most significant ones.

As summarized last year, in *Hildebrandt v. State*,<sup>135</sup> the court of appeals noted that article VII of the Indiana Constitution “authorizes independent appellate review and revision of a sentence imposed by the trial court,”<sup>136</sup> but it placed a heavy emphasis on the sentencing statute as providing crucial guidance. First, it observed that the presumptive sentence is “the starting point for *any*

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128. See IND. POST-CONVICTION R. 1(9)(c).

129. IND. APP. R. 45(B).

130. IND. APP. R. 46(A).

131. *Anders v. California*, 87 S. Ct. 1396, 1400 (1967).

132. See generally Schumm, *supra* note 21, at 1024.

133. *Id.* at 1032.

134. *Kien v. State*, 782 N.E.2d 398, 416 n.12 (Ind. Ct. App. 2003) (applying the amended rule even though the sentence was imposed in 2002).

135. 770 N.E.2d 355 (Ind. Ct. App. 2002).

136. *Id.* at 360.

court's consideration of the sentence which is appropriate for the crime committed."<sup>137</sup> The court focused on the "character of the offender" and summarized the relevant criteria as the statutory factors, which are "an assortment of general and specific, mandatory and discretionary considerations" that must first be reviewed by the trial court at sentencing "and then reviewed again if at issue on appeal."<sup>138</sup> This emphasis on the presumptive sentence factored heavily in review under the amended rule as well.

The first thorough discussion of the amended rule did not come until April. In *Rodriguez v. State*,<sup>139</sup> Judge Riley, writing for a panel that included Judges Baker and Mathias, provided a detailed account of the history of the 1970 constitutional amendment that gave Indiana's appellate courts the power to review and revise sentences, the appellate rule that has been amended over the years to implement the provision, and the interplay between the constitution, the rule, and the sentencing statute that governs the considerations for trial courts in imposing sentences.<sup>140</sup> The court then applied a two-tier review similar to that employed by the Indiana Supreme Court in *Carter v. State*<sup>141</sup> and other cases. It first reviewed the propriety of the trial court's finding of aggravating and mitigating circumstances; second, it reviewed the aggregate effect of the properly found aggravating and mitigating circumstances under Rule 7(B).<sup>142</sup> In the latter stage, the court relied on *Hildebrandt* in noting that the appellate court, like the trial court, should begin with the presumptive sentence.<sup>143</sup> The presumptive can be adjusted upward or downward based on the proper aggravating and mitigating circumstances, but the maximum sentence is generally appropriate only for "the worst offenders."<sup>144</sup>

Rodriguez had no criminal record, expressed remorse for his offense, accepted responsibility by pleading guilty, and possessed prior stable employment.<sup>145</sup> However, the trial court appropriately found the facts and circumstances of his offense as an aggravating circumstance. He had not merely operated a vehicle while intoxicated resulting in death; he was intoxicated at nearly three times the legal limit and was driving in a congested area during afternoon rush-hour traffic.<sup>146</sup> After engaging in what appears to be a *de novo* review of "the single proper aggravator and four significant mitigators," the court concluded that the maximum sentence of eight years was inappropriate and reduced the sentence to three and one-half years.<sup>147</sup>

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137. *Id.* at 361 (emphasis added).

138. *Id.*

139. 785 N.E.2d 1169 (Ind. Ct. App. 2003).

140. *Id.* at 1174-77.

141. 711 N.E.2d 835 (Ind. 1999).

142. *Rodriguez*, 785 N.E.2d at 1177-80.

143. *Id.* at 1179.

144. *Id.* at 1180.

145. *Id.*

146. *Id.*

147. *Id.*



A week later, the same panel that decided *Rodriguez* affirmed a maximum sentence of fifty years for voluntary manslaughter in *Flammer v. State*.<sup>148</sup> Although Flammer also did not have a prior criminal history and pleaded guilty to the offense, the court found that his character and his crime to be among “the very worst,” justifying the maximum sentence.<sup>149</sup> Specifically, it noted that he had repeatedly told his children that he was going to kill his wife with various weapons, killed her while his youngest child was only a few feet away, solicited his children’s help in disposing of the body, and intimidated his children into lying to police about their mother’s whereabouts.<sup>150</sup> In addition, the court also seemed to use Flammer’s mental illness against him, even though the trial court had found it to be a mitigating circumstance; Flammer had refused to take his medication, and it was likely that he would commit another crime.<sup>151</sup>

As initial forays into sentence review under the amended rule, *Rodriguez* and *Flammer* are significant because they represent a serious and thorough review of the sentence imposed, rather than the cursory review that often occurred in earlier cases.<sup>152</sup> They suggest that the amended rule has relaxed the standard by allowing an essentially *de novo* review of the length of the sentence imposed by the trial court (as in *Rodriguez*) or even aggravating and mitigating circumstances (as in *Flammer*). Although the cases mention the Rule 7(B) parlance of the “nature of the offense” and “character of offender,” the cases appear to place greater emphasis on the more detailed factors in the sentencing statute.

Weeks later, the same Riley-Baker-Mathias panel again reduced sentences, based at least in part on the principle that the maximum sentence “should be reserved for the very worst offenses and offenders,” in two more cases.<sup>153</sup> In *Jordan*, the court reduced a maximum sentence of twenty years for dealing in a schedule II controlled substance to fifteen years based on the defendant’s youth, extensive drug habit, the non-violent nature of his prior and present offense, and his request for drug treatment in lieu of retribution.<sup>154</sup> In *Westmoreland*, the court reduced the maximum sentence of twenty years for criminal deviate conduct to the presumptive term of ten years based on the limited nature of the defendant’s criminal history (non-violent misdemeanors and possession of marijuana) and his youthful age of seventeen at the time of the offense.<sup>155</sup> These four opinions suggest that, even in the nebulous realm of unique offenses and offenders, agreement is possible through the application of consistent principles.

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148. 786 N.E.2d 293 (Ind. Ct. App. 2003).

149. *Id.* at 300.

150. *Id.*

151. *Id.* This was the primary issue when oral argument was heard on Flammer’s petition to transfer in the Indiana Supreme Court.

152. See generally Schumm, *supra* note 21, at 1026-27, 1030.

153. *Westmoreland v. State*, 787 N.E.2d 1005, 1011 (Ind. Ct. App. 2003); see also *Jordan v. State*, 787 N.E.2d 993, 997 (Ind. Ct. App. 2003).

154. 787 N.E.2d at 997.

155. 787 N.E.2d at 1012.



However, the court of appeals' opinion in *Bennett v. State*,<sup>156</sup> makes clear that not all members of the court are on the same page. In *Bennett*, Judge Robb, joined by Judge Friedlander, reduced an aggregate sentence of forty-four years to twenty-six years. The court evaluated the sentence imposed on each count, finding the twenty year sentence for robbery should be reduced to twelve, the fifteen year sentence for criminal confinement should be reduced to ten, the six year sentence for carrying a handgun without a license should be reduced to four, and the three year sentence for theft should be reduced to one and one-half.<sup>157</sup> However, it upheld the maximum sentence of three years for resisting law enforcement, noting that Bennett was involved in a car chase at 100 miles per hour, putting in danger the lives of police officers and the public at large.<sup>158</sup> Ordering this count to be served concurrently with the receiving stolen property and handgun counts but consecutively to the other counts, the court arrived at its twenty-six-year sentence.<sup>159</sup> Although any sentencing decision will necessarily have an element of arbitrariness,<sup>160</sup> the count-by-count review in *Bennett* seems especially arduous. Perhaps this is unavoidable because, unlike the four cases cited above, it did not involve a single count.

*Bennett* also adds another, more significant wrinkle—a dissent. Judge Vaidik, a former trial judge, would have affirmed the forty-four year sentence, noting that the appellate court's "principal role in promoting consistency is to review sentences to ensure that they are based on appropriate aggravators and mitigators and are within the minimum and maximum sentence prescribed by our legislature."<sup>161</sup> She opined that Indiana would advance in the direction of consistency in sentencing "by maintaining our focus on the statutory parameters of sentencing established by our legislature, rather than second-guessing the trial court."<sup>162</sup>

Judge Vaidik's view appears to be at odds with the language of Appellate Rule 7(B), which specifically authorizes the review of sentences "authorized by statute" and the purpose of the 1970 constitutional amendment of which the rule is an outgrowth. It is also inconsistent with the approach of every Indiana Supreme Court justice and virtually every other judge on the court of appeals,<sup>163</sup> each of whom have authored or concurred in opinions that have reduced statutorily authorized sentences in many cases. Giving trial judges a virtual blank check at sentencing is unlikely to bring about consistency in sentencing. Rather, careful appellate review in published opinions that are grounded in the consistent application of sentencing principles and precedent is more likely to offer the necessary guidance to allow trial judges to impose consistent sentences, or, if that

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156. 787 N.E.2d 938 (Ind. Ct. App. 2003).

157. *Id.* at 950-51.

158. *Id.* at 951.

159. *Id.*

160. *See Carter v. State*, 711 N.E.2d 835, 843 (Ind. 1999).

161. *Bennett*, 787 N.E.2d at 953 (Vaidik, J., dissenting).

162. *Id.* (Vaidik, J., dissenting).

163. *See generally Schumm, supra* note 21, at 1025-29.



fails, allow litigants to effectively argue for that consistency on appeal.

Finally, the court also addressed the effect of Appellate Rule 7(B) on suspended sentences. In *Cox v. State*,<sup>164</sup> the court of appeals reviewed and revised a three-year sentence for theft. *Cox* is significant because it treats the three year sentence, two years of which were suspended, as a maximum sentence for purposes of review. Observing an absence of any prior distinction in Indiana decisional law between “maximum punishment and maximum sentences,”<sup>165</sup> the court expressed disagreement with another panel’s opinion a month earlier in *Beck v. State*.<sup>166</sup> The *Cox* majority observed that the Indiana Supreme Court had previously “used the phrases interchangeably as though synonymous.”<sup>167</sup>

Treating a partially suspended sentence as a maximum sentence is important because it may lead to application of the appellate courts’ oft-cited principle that maximum sentences should generally be reserved for worst offenses and worst offenders.<sup>168</sup> Although the majority in *Cox* did not cite or apply that principle, it did reduce the sentence after finding that the sole aggravating circumstance cited by the trial court was improper. Left with only two mitigating circumstances, the court revised the sentence to one year, six months of which was suspended.<sup>169</sup>

If the *Cox* approach is followed in future cases, it is likely that more sentencing challenges will be brought and will be successful because lengthy suspended sentences will require a hard look by the appellate court on direct appeal. However, because the suspended time may ultimately be ordered executed (in the event of a probation violation), this approach appears to be the proper one, as highlighted below.

In *McKnight v. State*,<sup>170</sup> the defendant-probationer challenged the imposition of a sentence of eighty-four of the previously suspended ninety-one months as “excessive.”<sup>171</sup> The lengthy suspended sentence had been imposed on a burglary charge in 1999 and revoked in 2002 based on the defendant’s commission of the Class C misdemeanor offense of minor consumption of alcohol, his failure to report and falsification of the report to his probation officer about the new charge, and a two and a half month lapse in reporting to his probation officer.<sup>172</sup>

According to statute, the trial court may order a defendant who has violated probation to be sentenced to the previously suspended sentence.<sup>173</sup> The court of

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164. 792 N.E.2d 878 (Ind. Ct. App. 2003).

165. *Id.* at 883 n.5.

166. 790 N.E.2d 520 (Ind. Ct. App. 2003).

167. 792 N.E.2d at 883 n.5.

168. *See, e.g.*, *Buchanan v. State*, 699 N.E.2d 655, 657 (Ind. 1998).

169. *Cox*, 792 N.E.2d at 883.

170. 787 N.E.2d 888 (Ind. Ct. App. 2003).

171. *Id.* at 892.

172. *Id.* at 893.

173. *See* IND. CODE § 35-38-2-3(g)(3) (2003) (allowing the trial court to “order execution of the sentence that was suspended at the time of initial sentencing”). Although not raised by the State or the court, the language of this provision does not mention the possibility of imposing a sentence

appeals reaffirmed that as long as the trial court adheres to the “proper procedures” in conducting a revocation hearing it does not abuse its discretion in ordering the execution of any amount of the suspended sentence upon a finding of a violation.<sup>174</sup>

Although the revocation in this case was based on several violations of conditions of probation, it is possible that a defendant could face a very lengthy sentence based simply on a relatively minor violation such as missing a couple of appointments with his or her probation officer, a new arrest for a petty offense, or testing positive for marijuana. If the length of the sentence is to be challenged, it appears necessary for the claim to be appealed immediately, as in *Cox*, even though the defendant may be pleased with the imposition of a suspended sentence. If not, a challenge to the length of the sentence upon revocation of probation—no matter what the basis—seems almost certain to fail.

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shorter than the originally suspended sentence.

174. *McKnight*, 787 N.E.2d at 892 (quoting *Goonen v. State*, 705 N.E.2d 209, 212 (Ind. Ct. App. 1999)).



# **SURVEY OF EMPLOYMENT LAW DEVELOPMENTS FOR INDIANA PRACTITIONERS**

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## **INTRODUCTION: NATIONAL TRENDS AND DEVELOPMENTS**

This survey period includes cases that should aid both employees and employers in future cases. For example, employee-plaintiffs have received some good news in the area of discrimination. Employee-plaintiffs can now receive a mixed-motive jury instruction without first proving evidence of direct discrimination.<sup>1</sup> They can count working shareholders who do not possess the requisite control, as defined by the common law test for “employees,” towards the number of employees required to bring an Americans with Disabilities Act (“ADA”) suit, and potentially use this test for other discrimination acts as well.<sup>2</sup> Additionally, the Seventh Circuit joined many other circuits allowing plaintiff-employees to state a § 1981 claim based on discriminatorily failing to promote an at-will employee.<sup>3</sup> Finally, the U.S. Supreme Court gave state employees a right to sue their state employer in federal court for Family Medical Leave Act violations.<sup>4</sup>

As for employer-defendants, the United States Supreme Court held an employer’s “neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA” to not rehire a terminated employee, regardless of his past drug addictions.<sup>5</sup> Procedurally, the United States Supreme Court affirmed the Eleventh Circuit, holding a Fair Labor Standards Act action could be removed from state to federal court.<sup>6</sup> Finally, a unanimous United States Supreme Court decided the “treating physician rule,” which gives deference to the determination of an employee’s treating physician over other examining doctors (namely, an employer’s doctor), has no place in Employee Retirement Income Security Act (“ERISA”) benefits plans.<sup>7</sup>

This Article analyzes many of the more notable Supreme Court decisions applicable to the area of employment law, including the University of Michigan affirmative action decisions and those mentioned above. It also discusses pertinent Seventh Circuit and Indiana state cases decided this past survey period. This Article concludes with our annual watch list: pertinent cases pending before

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1. *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2155 (2003).

2. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 123 S. Ct. 1673, 1675 (2003).

3. *Walker v. Abbott Labs.*, 340 F.3d 471, 472 (7th Cir. 2003).

4. *Nev. Dep’t of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1976 (2003).

5. *Raytheon Co. v. Hernandez*, 124 S. Ct. 513, 519 (2003).

6. *Breuer v. Jim’s Concrete, Inc.*, 123 S. Ct. 1882, 1883 (2003).

7. *Black & Decker Disability Plan v. Nord*, 123 S. Ct. 1965, 1967 (2003).

the United States Supreme Court that may change significant areas of employment law in the *next* survey period.

## I. GENERAL EMPLOYMENT DECISIONS

### A. Definition of Employee

This past survey period, the United States Supreme Court decided an important case that extends beyond the borders of the ADA. The Supreme Court in *Clackamas Gastroenterology Associates, P.C. v. Wells* held courts should use the common-law definition of "employee" where, as in the ADA, Congress does not effectively define it in the statute.<sup>8</sup> The ADA defines an employee as "an individual employed by an employer."<sup>9</sup> The EEOC argued, and the Court agreed, that courts should follow the common law definition of employee to determine the number of employees employed for purposes of the fifteen-person threshold for ADA applicability.<sup>10</sup> The Court abrogated the Seventh Circuit's decision in *EEOC v. Dowd & Dowd, Ltd.*,<sup>11</sup> which held that shareholders of a professional corporation engaged in the practice of law were not employees for purposes of Title VII. The Court used its holding in *Nationwide Mutual Insurance Co. v. Darden*<sup>12</sup> to adopt the common-law definition,<sup>13</sup> explaining that "as Darden reminds us, congressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning at common law."<sup>14</sup>

This case is particularly noteworthy because some speculate this definition of employee will be used in the context of much more than ADA cases.<sup>15</sup> Thus,

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8. 123 S. Ct. 1673, 1679 (2003).

9. *Id.* (quoting 42 U.S.C. § 12111(4) (2000)).

10. *Id.*

11. 736 F.2d 1177 (7th Cir. 1984).

12. 503 U.S. 318 (1992). *Darden* used the common law definition of "employee" as a definition for purposes of ERISA. *Id.* at 319.

13. See *Clackamas*, 123 S. Ct. at 1677 n.5 (common law test for determining employment status considers such factors as (1) who controls the manner and means of accomplishing the task, (2) the skill required, (3) the source of the tools, (4) the work location, (5) the duration of the working relationship, and (6) the method of payment). The Court sets forth the following common law factors: (1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; (2) whether and, if so, to what extent the organization supervises the individual's work; (3) whether the individual reports to someone higher in the organization; (4) whether, and if so, to what extent the individual is able to influence the organization; (5) whether the parties intended that individual be an employee, as expressed in written agreements or contracts; (6) whether the individual shares in the profits, losses, and liabilities of the organization. *Id.* at 1680.

14. *Id.* at 1679.

15. ERISA LITIG. REP., Oct. 2003, at 5. This publication warns ERISA litigators to consider the Court's definition of employee for purposes of ERISA litigation "since there is nothing special



practitioners must take note that the control factors in the common law test will likely be used to determine not only the threshold number of employees an employer retains for purposes of the ADA, but also for other statutes that do not specifically define employee. Only one month prior to the United States Supreme Court decision in *Clackamas*, the Seventh Circuit, in *Schmidt, M.D. v. Ottawa Medical Center, P.C.*, used control test factors to determine a doctor, who was also a shareholder in a closely-held professional corporation, was not an employee for purposes of the Age Discrimination in Employment Act ("ADEA").<sup>16</sup> The ADEA, like the ADA, does not adequately define the term employee, defining it only as "an individual employed by an employer."<sup>17</sup> The Seventh Circuit did not have the hindsight of the Supreme Court's decision in *Clackamas*, and instead it noted "[t]he Supreme Court may ultimately resolve this tension between statutory purpose and agency principles since it has granted certiorari in *Wells v. Clackamas Gastroenterology Associates*."<sup>18</sup> The Seventh Circuit determined the essence of either test consisted of where the control lies in the relationship.<sup>19</sup> Because Dr. Schmidt helped manage and control the professional corporation through his work on the board, as a shareholder, and as an officer, the Seventh Circuit held that Dr. Schmidt was not an employee for purposes of the ADEA and thus did not have an age discrimination claim.<sup>20</sup> Careful to contain its decision, the Seventh Circuit "only h[e]ld that when an individual claimant-shareholder enjoys the opportunity for shared control of the closely held professional corporation, including the opportunity to share in its profits, [it would] treat him or her as a bona fide employer for purposes of the ADEA."<sup>21</sup>

### B. Scope of EEOC's Authority

The Equal Employment Opportunity Commission's authority was strengthened this past survey period in *EEOC v. Sidley Austin Brown & Wood*.<sup>22</sup> The Seventh Circuit held the EEOC had the authority to issue a subpoena duces tecum to determine whether the law firm's demoted partners, none of whom filed charges with the EEOC, were employees for purposes of the ADEA.<sup>23</sup> Because the EEOC is able to bring ADEA claims without receiving a formal charge from

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about the definition of 'employee' in the ADA, it is a fair reading of the case that its holding will be applied under ERISA." *Id.*

16. 322 F.3d 461, 467 (7th Cir. 2003).

17. *Id.* at 463 (citing 29 U.S.C. § 630(f) (2002)).

18. *Id.* at 465.

19. *Id.* at 466.

20. *Id.* at 467-68. Dr. Schmidt is a shareholder, which gives him a vote in matters put before the owners. He sat on the board of the professional corporation, which gave him a vote in matters put before the board. Finally, he held a corporate officer position, which also gave him control.

21. *Id.*

22. 315 F.3d 696 (7th Cir. 2002).

23. *Id.* at 701.

an employee, the main issue was whether the EEOC could require the law firm to fully comply with the subpoena *ducas tecum*, which requested information on the status of the demoted partners to determine whether they could be classified as employees for purposes of the ADEA.<sup>24</sup>

The law firm argued it only needed to provide enough information regarding the partnership status of the demoted partners to show they were partners before their demotion.<sup>25</sup> It argued the partners shared in the debts of the partnership and sat on different committees at the firm; however, the court "[could] not understand how Sidley, without addressing the purpose of the employer exemption, can be so certain that it has proved that the 32 [demoted partners] are employers within the meaning of the ADEA. They are, or rather were, partners, but it does not follow that they were employers."<sup>26</sup>

The Seventh Circuit went on to differentiate between a partner and an employer, stating a simple re-labeling of a worker from employee to partner, without changing the employment relationship, does not change the status under the ADEA.<sup>27</sup> Thus, whether the demoted partners were, in fact, partners before their demotion is irrelevant.<sup>28</sup> "[T]he issue is not whether the 32 before their demotion were partners, an issue to which their liability for the firm's debts is germane; the issue is whether they were employers. The two classes, partners under state law and employers under federal antidiscrimination law, may not coincide."<sup>29</sup> Therefore, the court ordered Sidley Austin to comply with the portion of the subpoena that requested documents relating to the determination of whether the demoted partners were employers or employees.<sup>30</sup> That determination, the court said, must be decided before Sidley Austin should be made to turn over documents relating to the merits of the case.<sup>31</sup>

## II. EQUAL PROTECTION CLAUSE: THE AFFIRMATIVE ACTION DECISIONS

Perhaps the most notable cases this past year are the United States Supreme Court decisions regarding affirmative action plans used in undergraduate admissions<sup>32</sup> and law school admissions<sup>33</sup> at the University of Michigan. Although these cases were decided under the Fourteenth Amendment's Equal Protection Clause, the decisions impact employment strategies relating to affirmative action programs, thus precipitating a need for employment practitioners to understand them. Employers frequently consider diversity when

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24. *Id.*

25. *Id.* at 698-99.

26. *Id.* at 702.

27. *Id.* at 702-03.

28. *Id.* at 704.

29. *Id.*

30. *Id.* at 707.

31. *Id.*

32. *See Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).

33. *See Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).



determining which job candidates to hire and which employees to lay-off. The Supreme Court's decisions in *Grutter* and *Gratz* will impact those considerations.

In *Gratz v. Bollinger*, the Supreme Court held that the University of Michigan's affirmative action program at the undergraduate College of Literature, Science, and the Arts violated the Equal Protection Clause, Title VI, and § 1981.<sup>34</sup> Jennifer Gratz and Patrick Hamacher, both white applicants, were denied admission to the College and subsequently filed a class action suit alleging the policy violated the Equal Protection Clause, Title VI, and § 1981.<sup>35</sup> Although the College's admission program changed over the years pertinent to this lawsuit, it allowed minorities an advantage, either through different "Guidelines" tables for Caucasian and minority applicants, the "flagging" of minority applications, or, as set out in the current policy, awarding minorities an extra twenty points to the admissions scores (the students need 100 points for admission).<sup>36</sup> Using the Supreme Court's decision in *Bakke*, the district court concluded a racially and ethnically diverse student body was a compelling governmental interest and that the College's program, because it did not use rigid racial quotas, was narrowly tailored.<sup>37</sup> After all, the program did not set aside a set number of seats for minorities and "minority candidates were not insulated from review by virtue of those points."<sup>38</sup>

The Supreme Court granted certiorari, first addressing the Equal Protection Clause violation, stating,

Justice Powell's opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity.<sup>39</sup>

Then, through a series of examples, the Supreme Court concluded the policy was not narrowly tailored, because it did not provide individualized consideration and instead assigned a point value to minority status.<sup>40</sup> In Justice O'Connor's concurring opinion, she notes that "[e]ven the most outstanding national high school leader could never receive more than five points for his or her accomplishments—a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race."<sup>41</sup>

The Supreme Court explained in a footnote that because an institution that

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34. 123 S. Ct. at 2417.

35. *Id.* at 2417-18.

36. *Id.* at 2419.

37. *Id.* at 2421 (citing *Regents of Univ. v. Bakke*, 438 U.S. 265 (1978)).

38. *Id.*

39. *Id.* at 2428.

40. *Id.* at 2429-30.

41. *Id.* at 2432.

accepts federal funds violated the Equal Protection Clause, it also violated Title VI.<sup>42</sup> It further explained that contracts for educational services are contracts pursuant to § 1981 and, thus, the policy violated § 1981 as well.<sup>43</sup>

The Supreme Court, on the other hand, upheld the law school admissions program in *Grutter v. Bollinger*, because the individualized assessment of candidates the undergraduate program lacked was utilized at the law school level.<sup>44</sup> The Supreme Court decided once again that diversity is a compelling interest,<sup>45</sup> but this time decided the law school's admission policy, which "requires admissions officials to evaluate each applicant based on all the information available in the file," was narrowly tailored.<sup>46</sup> Distinguishing the undergraduate and law school decisions, the Supreme Court noted:

Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable. Unlike the program at issue in *Gratz v. Bollinger* . . . the Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity.<sup>47</sup>

When counseling employers, it is important to differentiate between public employers, who are bound by the U.S. Constitution in addition to Title VII, and private employers, who are bound by Title VII. Thus, public employers must abide by *Grutter* and *Gratz* when making hiring decisions. Public employers must first have a compelling interest in diversity hiring programs. The Supreme Court in *Grutter* and *Gratz* upheld both schools' interest in providing a diverse learning experience. The Supreme Court, however, differentiated between the undergraduate program's practice of assigning points to minority applicants and the law school's program, which individually reviewed the applicants.<sup>48</sup> Thus, when counseling large public employers on hiring practices, attorneys must explain the importance of an individualized review of every job applicant. Point scales, like the one formally used by the undergraduate school at Michigan, should be avoided in addition to reserving a set number of job openings for minorities.

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42. *Id.* at 2431 n.23.

43. *Id.*

44. 123 S. Ct. 2325, 2345 (2003).

45. *Id.* at 2339.

46. *Id.* at 2327.

47. *Id.* at 2343.

48. *Id.*



### III. TITLE VII

#### A. *Burdens of Proof*

During this past survey period, the United States Supreme Court simplified the proof a plaintiff must show to obtain a mixed-motive jury instruction. In *Desert Palace, Inc. v. Costa* the Supreme Court held a plaintiff need not prove *direct* evidence of discrimination in order for the jury to be instructed as to a mixed-motive case.<sup>49</sup> This case presented the Court with its first chance to interpret “the effects of the 1991 Act on jury instructions in mixed-motive cases.”<sup>50</sup>

The plaintiff, the only female warehouse worker and heavy equipment operator, presented only indirect evidence of sex discrimination, but the district court gave a mixed-motive jury instruction.<sup>51</sup> The jury instruction, which instructed the jury it must side with the plaintiff if it found the plaintiff’s sex was a motivating factor, advised the jury that the defendant must prove it would have treated the plaintiff the same even if sex had not played a role in its decision.<sup>52</sup> The Supreme Court held this instruction was appropriate because the statute on its face makes no mention of a heightened direct evidence requirement for the plaintiff.<sup>53</sup> The statute simply states the plaintiff must “‘demonstrate’ that an employer used a forbidden consideration with respect to ‘any employment practice.’”<sup>54</sup> Further, the Court reasoned, Title VII contains similar language, allowing an employer to “‘demonstrat[e] that [it] would have taken the same action in the absence of the impermissible motivating factor,’” which also does not require a heightened direct evidence requirement.<sup>55</sup> Thus, the Court concluded “[i]n order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for any employment practice.’”<sup>56</sup>

#### B. *The Single-Filing Doctrine*

The single-filing or piggybacking doctrine allows a claimant whose claims arise out of the same discriminatory acts to, essentially, piggyback off another employee’s EEOC charge, allowing the employee to bypass the EEOC’s administrative filing requirements.<sup>57</sup> The doctrine was meant to prevent the

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49. 123 S. Ct. 2148, 2155 (2003).

50. *Id.* at 2153.

51. *Id.* at 2152.

52. *Id.*

53. *Id.* at 2153.

54. *Id.* (quoting 42 U.S.C. § 2000e-2(m) (2002)).

55. *Id.* at 2154-55 (quoting 42 U.S.C. § 2000e-5(g)(2)(B)).

56. *Id.* at 2155 (quoting 42 U.S.C. § 2000e-2(m)).

57. *Horton v. Jackson County Bd. of County Comm’rs*, 343 F.3d 897, 899 (7th Cir. 2003).

EEOC from an inundation of claims that all arose from the same conduct.<sup>58</sup> In *Horton v. Jackson County Board of County Commissioners*, the Seventh Circuit decided an employee, who was fired at the same time as the employee into whose lawsuit she wished to intervene, did not prove sufficient similarities between her claim and the other employee's claim to allow her to bypass the EEOC administrative requirement.<sup>59</sup> The employee claimed she was fired at the same time as another employee in retaliation for the other employee filing a complaint with the EEOC three years prior.<sup>60</sup> The court discussed the history of the doctrine, noting its use initially in the context of class actions and speculating that after the Supreme Court's decision in *National Railroad Passenger Corp. v. Morgan*<sup>61</sup> the Court may decide to limit the doctrine's use only to class actions.<sup>62</sup> Further, the court found, even if the doctrine were to be used for a mere two complainants, the facts show the employer retaliated against the other employee because she filed an earlier complaint, whereas the employer retaliated against Horton for sticking up for the other employee.<sup>63</sup> Thus, the court decided the reasoning behind filing with the EEOC, namely attempting a conciliation, would be undermined if an employee could simply bypass the administrative requirement by claiming he or she supported another employee's charge.<sup>64</sup>

### C. Same Sex Sexual Harassment

Although the protections of Title VII extend to same-sex harassment, they do not extend to sexual orientation claims.<sup>65</sup> The case law makes this distinction clear.<sup>66</sup> Determining, however, whether a sexual remark is, on the one hand, based on sexual orientation or, on the other hand, based on sex proves difficult. For this reason, Judge Posner in *Hamm v. Weyauwega Milk Products, Inc.* wrote a separate concurring opinion in an attempt to clear up the case law that, as he put it, currently "holds . . . that although Title VII does not protect homosexuals from discrimination on the basis of their sexual orientation, it protects heterosexuals who are victims of 'sex stereotyping' or 'gender stereotyping.'"<sup>67</sup> The *Hamm* case involved an all male workforce that repeatedly made homosexual comments to the plaintiff, a heterosexual.<sup>68</sup> The Seventh Circuit

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58. *See id.* at 900.

59. *Id.* at 901.

60. *Id.* at 898.

61. 536 U.S. 101 (2002). In *Morgan*, the Supreme Court determined "each discriminatory act starts a new clock for filing charges alleging that act." *Id.* at 113.

62. *Horton*, 343 F.3d at 900.

63. *Id.* at 900-01.

64. *Id.*

65. *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003).

66. *Id.* at 1066-67 (Posner, J., concurring) (discussing the evolution of Title VII case law on sexual orientation discrimination).

67. *Id.* at 1066 (Posner, J., concurring).

68. *Id.* at 1059-60.



concluded the plaintiff did not sufficiently show he was discriminated against *because of his sex*.<sup>69</sup> Judge Posner's concurrence separated an earlier U.S. Supreme Court case, *Price Waterhouse v. Hopkins*,<sup>70</sup> from the current cases that have attempted to interpret it.<sup>71</sup> In Judge Posner's view,

If an employer refuses to hire unfeminine women, its refusal bears more heavily on women than men, and is therefore discriminatory. That was the *Hopkins* case. But if, as in this case, an employer *whom no woman wants to work for* . . . discriminates against effeminate men, there is no discrimination against men, just against a subclass of men. They are discriminated against not because they are men, but because they are effeminate.<sup>72</sup>

#### *D. Sex Discrimination*

The Seventh Circuit decided two significant sex discrimination cases in the last quarter of 2002. The first held an employee does not suffer sex discrimination when a co-worker of the opposite sex receives preferential treatment because of a sexual relationship she had with a supervisor.<sup>73</sup> The second held a city employer is entitled to a new trial if, after hearing evidence of both disability and sex discrimination the jury awards a verdict for the plaintiff, and the trial judge subsequently vacates the ADA award, leaving behind the Title VII sex discrimination award.<sup>74</sup>

First, in *Schobert v. Illinois Department of Transportation*, an employee claimed he was sexually discriminated against because he suffered from the harassment of a co-worker, or in the alternative, that he suffered because of the preferential treatment the female co-worker received as a result of the consensual relationship.<sup>75</sup> Using the Fifth Circuit's decision in *Ellert v. University of Texas* as a guide, the Seventh Circuit held an employee could not maintain a claim of sexual harassment if that employee did not suffer the harassment.<sup>76</sup> The Seventh Circuit held that "unless [the plaintiff] offered evidence that he too directly endured the same kind of harassment, which he has not, he does not have a claim of sex discrimination."<sup>77</sup>

The court then addressed the plaintiff's second argument, that the plaintiff suffered because the female employee was favored due to her consensual

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69. *Id.* at 1062.

70. 490 U.S. 228 (1989). That case allowed evidence that the female plaintiff's superiors did not like her unfeminine appearance to show the plaintiff was denied a promotion. *Id.* at 235.

71. *Hamm*, 332 F.3d at 1066 (Posner, J., concurring).

72. *Id.* at 1067 (Posner, J., concurring).

73. *Schobert v. Ill. Dep't of Transp.*, 304 F.3d 725, 733 (7th Cir. 2002).

74. *Shick v. Ill. Dep't of Human Servs.*, 307 F.3d 605, 612 (7th Cir. 2002).

75. 304 F.3d at 727.

76. *Id.* at 732-33 (citing *Ellert v. Univ. of Tex.*, 52 F.3d 543, 546 (5th Cir. 1995)).

77. *Id.* at 733.

relationship with a supervisor. According to the court, "Title VII does not, however, prevent employers from favoring employees because of personal relationships."<sup>78</sup> The court differentiated simply favoring a woman with a personal relationship with a supervisor, on the one hand, from sex discrimination, on the other, stating that other women in the shop would have received the same treatment as the males—the preferential treatment was due to the personal relationship, not sex discrimination.<sup>79</sup>

Next, in a very unique case, the Seventh Circuit addressed the issue of prejudice once a jury hears both evidence of disability discrimination under the ADA and sex discrimination under Title VII.<sup>80</sup> In *Shick v. Illinois Department of Human Services*, the jury heard evidence of both disability and sex discrimination before deciding to award the plaintiff damages. The jury heard evidence that Shick's supervisor was insensitive towards his need for disability accommodation. She apparently removed Shick's sleeping bag from the men's restroom, which he used to take naps during lunch because of his sleep apnea.<sup>81</sup> She banged on the men's restroom door if he took too long in the restroom, which he frequently did because he had an intestinal disease that caused internal bleeding. She moved a copy machine and printer near his desk to create more noise because she knew he had a hearing problem from his service in the war. She replaced his favorite chair, which he needed because he was tall and overweight, with a chair he had to adjust several times per day. She required Shick to use his eye drops, which he used because his intestinal disease caused one eye to weaken to the extent of near-blindness, at his desk instead of the men's restroom and made Shick obtain a doctor's note for his frequent restroom breaks. Additionally, Schick's boss favored the female employees by allowing them to take longer breaks, eat at their desks, and provided them with their own offices, none of which Shick was afforded.<sup>82</sup> His boss also made a few negative comments about men, which Shick attributed to her recent divorce. Shick even presented her with a log of the discrepancies between the women's breaks and his, but she refused to discuss it.

According to Shick, the sex and disability discrimination grated on him to the point he began having serious mental problems. He finally went to the EEOC, but the intake personnel said it would take over a year for the EEOC to do anything. On his way back from the EEOC's office in Chicago, although he said he does not remember it, he, "robbed a White Hen convenience store of about \$200 while brandishing a sawed-off shotgun."<sup>83</sup> He blamed the robbery on his

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78. *Id.*

79. *Id.*

80. *Shick v. Ill. Dep't of Human Servs.*, 307 F.3d 605, 612 (7th Cir. 2002).

81. *Id.* at 608.

82. *Id.* at 609.

83. *Id.* The sawed-off shotgun he apparently carries in his trunk because he carries large sums of money from a side business he runs and also because he gambles. He sawed-off the gun, which he received years before when a burglar dropped it after he and his wife interrupted the burglary. Apparently the burglars ran over the gun and bent the barrel, which he subsequently



unstable mental state caused by the sex and disability discrimination.

After hearing the evidence of sex and disability discrimination, the jury awarded Shick \$5 million for emotional pain and suffering and \$106,700 in lost past earnings. The district court vacated the ADA verdict, citing the Seventh Circuit's decision in *Erickson v. Board of Governors*,<sup>84</sup> which held the ADA "is not a valid abrogation of states' Eleventh Amendment immunity."<sup>85</sup> The district court capped the sex discrimination award at \$300,000, awarded backpay, attorney's fees, and front pay until he reached age sixty-five,<sup>86</sup> and denied the defendant's motion for a new trial.

The Seventh Circuit noted, "the most compelling evidence of [Shick's] abuse was not in fact due to Shick's sex, but because of his disabilities."<sup>87</sup> The Seventh Circuit discussed the evidence, the majority of which dealt with Shick's disability discrimination, and weighed it against the evidence of sex discrimination, deciding "the occasions of sex discrimination are minuscule compared to the many conflicts involving his medical problems and disabilities."<sup>88</sup> The Seventh Circuit went on to explain, "[i]t is hard to imagine how a jury would have accepted this extraordinary theory for which it initially awarded Shick five million dollars, without the extensive testimony about the abusive treatment regarding his many ailments."<sup>89</sup> The Seventh Circuit concluded the district court abused its discretion when it denied the employer a new trial, stating "[the jury's] reaction ha[d] everything to do with disability discrimination and very little to do with sex discrimination."<sup>90</sup>

The Seventh Circuit went on to consider the award of front pay, concluding that employer's actions were not the proximate cause of Shick's criminal conviction and subsequent incarceration.<sup>91</sup> Concluding Shick's armed robbery was a superseding cause, the Seventh Circuit held Shick could not recover any damages from his conviction or incarceration.<sup>92</sup>

### *E. Hostile Environment*

The Seventh Circuit in *Quantock v. Shared Marketing Services, Inc.*<sup>93</sup> reversed a district court decision, holding instead that three propositions for sex in a single meeting were severe enough to withstand summary judgment, regardless of the pervasiveness of the comments. "The district court noted that

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sawed-off in order to salvage the gun. *Id.* at 610.

84. 207 F.3d 945 (7th Cir. 2000).

85. *Shick*, 307 F.3d at 610 (citing *Erickson*, 207 F.3d at 952).

86. The plaintiff was convicted of the armed robbery and is serving ten years in jail for it.

87. *Shick*, 307 F.3d at 612.

88. *Id.* at 613.

89. *Id.*

90. *Id.* at 614.

91. *Id.* at 615.

92. *Id.*

93. 312 F.3d 899 (7th Cir. 2002).

the incident of harassment was an isolated occurrence, short in duration, and that it involved no physical touching."<sup>94</sup> The Seventh Circuit, however, evaluated the directness of the comments and the authority of the commenter holding a reasonable jury *could* conclude the three propositions for sex<sup>95</sup> made directly to the plaintiff in one single meeting were sufficiently severe enough to alter the plaintiff's employment terms.<sup>96</sup> Reiterating its earlier decision, the Seventh Circuit stated, "abusive conduct 'need not be both severe *and* pervasive to be actionable; one or the other will do.'"<sup>97</sup> Thus, the Seventh Circuit reversed, holding an issue of fact existed as to the objective and subjective severity of the sexual propositions.

#### IV. SECTION 1981: AT-WILL EMPLOYMENT CONTRACT

The Seventh Circuit joined the Second, Fourth, Fifth, Eighth, and Tenth Circuits when it decided an at-will employment relationship is a contract sufficient to state a § 1981 claim based on discriminatorily failing to promote.<sup>98</sup> Before deciding the main issue, however, the court decided a few small procedural issues. Although Title VII and § 1981 both provide a cause of action under disparate-treatment, the Seventh Circuit in *Walker v. Abbott Laboratories* decided an employee who fails to raise a Title VII claim with his § 1981 claim does not waive all intentional-discrimination theories by his failure to do so.<sup>99</sup> The district court in *Walker* held an at-will employee cannot maintain a § 1981 disparate-treatment cause of action, but the plaintiff did not amend his complaint to add a Title VII disparate-treatment cause, which does not require a contractual relationship.<sup>100</sup> The defendant unsuccessfully argued the plaintiff waived his right to appeal the dismissal of his § 1981 claim because he did not raise a Title VII claim before appealing.<sup>101</sup> The Seventh Circuit was not persuaded, instead "find[ing] this argument wholly without merit."<sup>102</sup>

The defendant then argued the plaintiff waived his right to appeal the dismissal of his § 1981 claim because "he failed to ask the district court to reconsider its ruling in light of new decisions from other circuits."<sup>103</sup> The Second, Eighth, and Tenth Circuits have, since the district court's ruling, decided

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94. *Id.* at 903-04.

95. The plaintiff asserts her supervisor first propositioned her to give him oral sex, then a "threesome," and finally phone sex. The plaintiff states she rejected all three propositions.

96. *Quantock*, 312 F.3d at 904.

97. *Id.* (quoting *Hostettler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7th Cir. 2000)).

98. *Walker v. Abbott Labs.*, 340 F.3d 471, 475-77 (7th Cir. 2003).

99. *Id.* at 474.

100. *Id.* at 473.

101. *Id.*

102. *Id.* at 474.

103. *Id.*



at-will employees could bring § 1981 claims.<sup>104</sup> The Court once again found the defendant's argument "wholly without merit," stating "there is simply no rule or case law that requires litigants to move for reconsideration of an interlocutory ruling in order to avoid waiving a challenge to that ruling on appeal of a final decision."<sup>105</sup>

Finally, the court reviewed the merits of the plaintiff's appeal of the § 1981 claim, which centers around whether at-will employment falls within § 1981's purview.<sup>106</sup> "Section 1981 provides that '[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.'"<sup>107</sup> The Second, Fourth, Fifth, Eighth, and Tenth Circuits are the only circuits that have addressed this issue and all have all concluded that at-will employees could state a claim under § 1981.<sup>108</sup> Deciding "[t]he lack of a fixed duration of employment does not make the relationship any less contractual," the court found an at-will employee could state a § 1981 claim for discrimination in promotion and pay.<sup>109</sup>

The court did not, however, explicitly contravene its dicta in *Gonzalez*, simply stating *Gonzalez* was only dicta. The court further differentiated *Gonzalez*, which stated an at-will employee may not be able to state a § 1981 claim for being fired or laid-off.<sup>110</sup> The Seventh Circuit in the *Walker* case decided an at-will employee may state a § 1981 claim for failure to promote; however, the court still leaves open the issue of whether an at-will employee who was terminated or laid-off can bring a valid § 1981 claim.

## V. AMERICANS WITH DISABILITIES ACT

### A. Disparate-Impact Analysis Within a Disparate-Treatment Case

The Supreme Court heard a pertinent ADA case in 2003, but the case was remanded to the Ninth Circuit and the main issue left undecided. The Supreme Court in *Raytheon Co. v. Hernandez*<sup>111</sup> did not decide whether an employer's decision not to rehire a recovered addict,<sup>112</sup> who previously quit in lieu of discharge, violated the ADA. It instead decided the Ninth Circuit should have

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104. *Id.* Obviously, the persuasive authorities of other circuits do not bind the Seventh Circuit.

105. *Id.* at 475.

106. *Id.*

107. *Id.* (quoting 42 U.S.C. § 1981(a) (2003)).

108. See *Skinner v. Maritz*, 253 F.3d 337 (8th Cir. 2001); *Lauture v. Int'l Bus. Machs.*, 216 F.3d 258 (2nd Cir. 2000); *Perry v. Woodward*, 199 F.3d 1126 (10th Cir. 1999); *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015 (4th Cir. 1999); *Fadeyi v. Planned Parenthood Ass'n, Inc.*, 160 F.3d 1048 (5th Cir. 1998).

109. *Walker*, 340 F.3d at 477.

110. *Gonzalez v. Ingersoll Mill Mach. Co.*, 133 F.3d 1025, 1035 (7th Cir. 1998).

111. 124 S. Ct. 513 (2003).

112. The decision not to rehire was made pursuant to its policy against rehiring employees who violated company policy.

applied a disparate-treatment analysis instead of analyzing the case under a disparate-impact analysis.<sup>113</sup> The respondent in *Hernandez* quit in lieu of discharge because he tested positive for and admitted to cocaine use. Over two years later, he applied for a position with the company, who rejected his application because of his prior termination for violation of company rules and regulations. Respondent sued alleging the employer refused to hire him because of his drug addiction disability, in violation of the ADA.<sup>114</sup> The employee failed to plead the issue of disparate-impact in a timely manner, so the district court only reviewed the case under a disparate-treatment theory.<sup>115</sup>

In evaluating the *McDonnell Douglas* burden-shifting test that is required for a disparate-treatment analysis, the Ninth Circuit incorrectly intertwined the disparate-impact analysis.<sup>116</sup> The second prong of the *McDonnell Douglas* disparate-treatment analysis, that the employer must proffer a legitimate non-discriminatory reason for its decision, was incorrectly evaluated by the Ninth Circuit. The Ninth Circuit held the no-rehire policy had a disparate-impact on recovering drug addicts; and, thus, was not a legitimate, nondiscriminatory reason. The Supreme Court reasoned that “[h]ad the Court of Appeals correctly applied the disparate-treatment framework, it would have been obliged to conclude that a neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA.”<sup>117</sup> Thus, the Ninth Circuit incorrectly analyzed a disparate-treatment case under a disparate-impact analysis and the Supreme Court remanded the case requiring a disparate-treatment analysis. As a consequence, it is still undecided whether an employer’s decision not to rehire a recovered addict who previously quit in lieu of discharge violates the ADA.

### *B. Defining a Disability Through the Employer “Regarded As” Provision*

The Seventh Circuit reviewed three cases further defining what constitutes a disability under the ADA’s<sup>118</sup> employer “regarded as” provision. First, the

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113. *Hernandez*, 125 S. Ct. at 516.

114. *Id.* at 517. “Respondent proceeded through discovery on the theory that the company rejected his application because of his record of drug addiction and/or because he was regarded as being a drug addict.” *Id.* Under the ADA, a disability includes both a record of, or simply being regarded as having, an impairment. See 42 U.S.C. § 12102(2) (1995).

115. *Hernandez*, 124 S. Ct. at 517. Under a disparate-impact analysis, the respondent would have argued that even if the company failed to rehire him pursuant to its neutral no-rehire policy, the policy in effect discriminates against recovering addicts. Because the respondent failed to initially plead this, he was left to argue that the company’s policy was not neutral on its face, but instead discriminated against him “on its face.” The respondent failed to timely plead the “as applied” argument, and therefore could not raise it in the context of a disparate-treatment analysis.

116. *Id.* at 518-19.

117. *Id.* at 519.

118. In the third case, the Seventh Circuit interprets the ADA’s “regarded as” clause in the context of the Rehabilitation Act. The Rehabilitation Act protects qualified individuals with a disability from disability discrimination by any program receiving federal financial assistance. See



Seventh Circuit determined an employer did not regard as disabled its employee, a truck driver with an injured hand.<sup>119</sup> Although the employer allegedly told the employee “he was being fired because of his disability, he was crippled, and the company was at fault for having hired a handicapped person,” the Seventh Circuit held that did not mean the employer *regarded* him as disabled for purposes of the ADA.<sup>120</sup> Calling an employee “crippled” or “handicapped” does not equate to knowledge that the employee is protected under the ADA. If simply regarding an employee as somehow “crippled” meant the employer regarded the employee as “protected under the ADA,” then, the Court feared, employers would simply not hire partially crippled workers.<sup>121</sup> “Allowing this suit to go forward would merely discourage employers from giving a chance for employment to workers who have some degree of disability.”<sup>122</sup> Thus, in order for the “regarded as” provision of the ADA to apply, the employer must regard the employee as protected under the ADA, not simply regard the employee as crippled or handicapped.

The Seventh Circuit in *Mack v. Great Dane Trailers*<sup>123</sup> also found the employer, Great Dane, did not regard its employee as disabled. The employee, Mack, had drop foot, which restricted his ability to lift. In order to be regarded as disabled, the employee must show his employer believes he is “substantially limited” in a “major life activity.”<sup>124</sup> Mack claimed his employer believed he was substantially limited in lifting, which according to the EEOC regulations is a major life activity. Although Mack’s drop foot impaired his ability to work, the court was not phased, citing United States Supreme Court precedent that a work-related impairment “does not necessarily rise to the level of a disability within the meaning of the ADA.”<sup>125</sup> Just regarding Mack as substantially limited in lifting at work does not mean his employer regarded him as substantially limited in his daily life activities.<sup>126</sup> The court reviewed the evidence, a doctor’s note stating Mack was restricted from lifting “at work,” the testimony from the human resources manager stating Mack was unable to lift “at work,” all of which could not conclude that Great Dane regarded Mack as disabled.<sup>127</sup>

Mack further argued that Great Dane accommodated<sup>128</sup> a similarly situated employee and, therefore, the jury could have inferred Great Dane regarded Mack

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29 U.S.C. § 794(a) (1999).

119. *Tockes v. Air-Land Transp. Serv., Inc.*, 343 F.3d 895 (7th Cir. 2003). The Supreme Court denied certiorari of this case on February 23, 2004. *See Tockes v. Air-Land Transp. Serv., Inc.*, 124 S. Ct. 1414 (2004) (mem.).

120. *Tockes*, 343 F.3d at 896.

121. *Id.*

122. *Id.*

123. 308 F.3d 776 (7th Cir. 2002).

124. *Id.* at 780.

125. *Id.* (citing *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002)).

126. *Id.* at 782.

127. *Id.*

128. The only employee that was accommodated received light duty work.

as disabled.<sup>129</sup> The Seventh Circuit, however, labeled this inference "illogical," stating "[t]he fact that Great Dane accommodated the other employee but not Mack does not support the inference that it regarded Mack as disabled. It is equally likely, if not more likely, that Great Dane regarded the other employee as disabled and therefore accommodated him but not Mack."<sup>130</sup> Thus, the Seventh Circuit concluded Great Dane did not regard Mack as disabled within the meaning of the ADA because the only information it received regarding his medical problems related to his ability to work.<sup>131</sup>

Finally, the Seventh Circuit interpreted the employer "regarded as" provision in the context of the Rehabilitation Act in *Peters v. City of Mauston*.<sup>132</sup> The Rehabilitation Act uses the ADA's standards to determine whether an employer who receives federal financial assistance discriminates against a qualified individual with a disability solely because of his disability.<sup>133</sup> Peters, whose doctor restricted his lifting after a shoulder injury, argued the City regarded him as disabled in the major life activity of working. "It is clear, however, that an employer does not regard a person as disabled simply by finding that the person cannot perform a particular job."<sup>134</sup> The employee must instead show evidence that indicates he is excluded from a number of jobs because of his impairment.<sup>135</sup> Because Peters "in no way presented evidence that he was substantially limited in his ability to work," the Seventh Circuit held his employer could not have regarded him as disabled.<sup>136</sup> In fact, Peters told his employer he "painted three rooms and varnished the floors in his house, cleaned out his garage, and built deer stands" during his disability time off. Thus, the court held, his employer did not regard him as disabled.<sup>137</sup>

Furthermore, the court held Peters did not even meet the definition of a "qualified individual with a disability" because Peters could not satisfy the essential functions of the job with reasonable accommodations. Peters asserted the City could hire someone else to do the heavy lifting, which Peters could not do; however, the Seventh Circuit did not think this accommodation was reasonable, stating, "it requires another person to perform an essential function of Peters' job."<sup>138</sup> Peters also recommended waiting to see whether he could lift the required amount for the job, to which the court stated "[t]he employer is not obligated to allow the employee to try the job out in order to determine whether some yet-to-be requested accommodation may be needed."<sup>139</sup> Thus, Peters did

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129. *Mack*, 308 F.3d at 782-83.

130. *Id.* at 783.

131. *Id.* at 783-84.

132. 311 F.3d 835 (7th Cir. 2002).

133. *Id.* at 842.

134. *Id.* at 843.

135. *Id.*

136. *Id.* at 844-45.

137. *Id.* at 844.

138. *Id.* at 845.

139. *Id.* at 846.



not prove his employer regarded him as disabled and did not request a reasonable accommodation that would allow him to meet the requirements of the job.

### C. Reasonable Accommodations

The Seventh Circuit has continued to define “reasonable accommodations” under the ADA, this time determining whether a reasonable accommodation includes allowing a disabled software engineer to work from a home office. In *Rauen v. United States Tobacco Manufacturing Ltd. Partnership*, the Seventh Circuit affirmed the district court’s grant of summary judgment, but found for the employer for a different reason than the district court.<sup>140</sup> The district court, using an unpublished Sixth Circuit case,<sup>141</sup> decided that the employee, although disabled, had performed all the essential functions of her job without an accommodation, thus making her request for an accommodation unreasonable.<sup>142</sup>

Rauen originally requested to work from a home office after returning from disability leave in January 1999. After undergoing treatment for rectal cancer, Rauen was diagnosed with breast cancer as well. She is missing part of her small intestine, which requires her to take IV fluid, increasing the frequency of her restroom breaks and requiring an ostomy bag that must be emptied regularly.<sup>143</sup> The routine restroom breaks she must make on her trip to work each day increase her fatigue, and she risks falling asleep at the wheel on her way to work. After her initial accommodation request, Rauen continued to work from the time of her initial request in 1999 until October 2001, when the district court granted her employer’s summary judgment motion. The district court reasoned that because Rauen could, and did, complete her job without the requested accommodation, she could not prove the reasonableness of any accommodation.<sup>144</sup> In the district court’s eyes, Rauen did not need an accommodation because she performed her job without one.<sup>145</sup>

The Seventh Circuit affirmed the district court’s ruling, but instead determined that “the specific accommodation that Rauen has requested in this case is not reasonable.”<sup>146</sup> Revisiting its earlier decision in *Vande Zande v. Wisconsin Department of Administration*, the Court held “working at home is rarely a reasonable accommodation . . . because most jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation.”<sup>147</sup> The Seventh Circuit looked to the evidence, which

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140. 319 F.3d 891, 895 (7th Cir. 2003).

141. See *Black v. Wayne Ctr.*, No. 99-1225, 2000 WL 1033026, at \*3 (6th Cir. 2000).

142. *Rauen*, 319 F.3d at 896.

143. *Id.* at 893.

144. *Id.* at 896.

145. See *id.*

146. *Id.*

147. *Id.* (citing *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995) (holding a home office is not a reasonable accommodation for a secretary and that “it would take a very extraordinary case for the employee to be able to create a triable issue of the employer’s

showed Rauen's "primary job responsibilities involve monitoring contractors' work, answering contractors' questions as they arise, and ensuring that the contractors' work does not interfere with the manufacturing process."<sup>148</sup> Thus, her job "requires teamwork, interaction, and coordination of the type that requires being in the work place."<sup>149</sup>

The Seventh Circuit did not explicitly decide whether a disabled employee who can perform her job functions without an accommodation can reasonably request an accommodation; however, it did state that, although not impossible, it is definitely more difficult to prove the reasonableness of an accommodation while performing all essential job functions without an accommodation.<sup>150</sup>

## VI. FAMILY AND MEDICAL LEAVE ACT

### A. State Employees Entitled to Sue Under FMLA

Although the states enjoy immunity from federal jurisdiction under the Eleventh Amendment, that protection is not all-encompassing. The United States Supreme Court reevaluated the breadth of the Eleventh Amendment this survey period in *Nevada Department of Human Resources v. Hibbs*.<sup>151</sup> The Court in *Hibbs* held state employees may recover damages for a state employer's violation of the Family and Medical Leave Act ("FMLA"). As long as Congress (1) acts in accordance with its Section 5 powers under the Fourteenth Amendment, and (2) the language of its act shows a clear intent to abrogate state immunity, Congress may pass a law abrogating the states' Eleventh Amendment immunity.<sup>152</sup> The language of the FMLA makes clear Congress's intent to do so, allowing employees to request damages "against any employer (including a public agency)."<sup>153</sup> The Act then proceeds to include government entities in the definition of a public agency.<sup>154</sup> Thus, the Court explained, Congress showed a clear intent on the face of the FMLA to abrogate the states' Eleventh Amendment immunity.

The Court next discussed the second prong of the test, Congress's Section Five powers under the Fourteenth Amendment. *City of Boerne v. Flores*<sup>155</sup> outlines the pertinent test to determine whether Congress's Section Five legislation is valid.<sup>156</sup> According to the Court, for Section 5 legislation to be valid, it "must exhibit 'congruence and proportionality between the injury to be

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failure to allow the employee to work at home"))).

148. *Id.* at 897.

149. *Id.*

150. *Id.*

151. 123 S. Ct. 1972 (2003).

152. *Id.* at 1977.

153. *Id.* at 1976 (quoting 29 U.S.C.A. §§ 2611(4)(A)(iii) (1993)).

154. *Id.* at 1977.

155. 521 U.S. 507 (1997).

156. *Hibbs*, 123 S. Ct. at 1978.



prevented or remedied and the means adopted to that end.”<sup>157</sup> In interpreting the congruence and proportionality of the FMLA, the Court outlined the states’ history of gender discrimination in regard to family leave, noting that gender-based discrimination receives heightened scrutiny.<sup>158</sup> Because Section 5 gives Congress the power to enforce equal protection of the laws,<sup>159</sup> the Court held Congress was justified in passing the FMLA,<sup>160</sup> which “aims to protect the right to be free from gender-based discrimination in the workplace.”<sup>161</sup> Thus, the Court explained, because Congress passed both prongs of the test, state employers may be sued in federal court by its employees for FMLA violations.

### *B. Notice to Employer of Family Medical Leave*

The Seventh Circuit in *Byrne v. Avon Products, Inc.*<sup>162</sup> found a genuine issue of material fact when an employee who suffered from severe depression was fired after missing a meeting at work. Byrne’s employer, Avon Products, installed cameras in the break room, which revealed Byrne sleeping and reading for three hours during work one evening. The next day Byrne told a co-worker he wasn’t feeling well and left work early. When Avon Products called his home, his sister told his employer he was “very sick.” A facility engineer spoke with Byrne on the phone and, after “mumbl[ing] several odd phrases” Byrne agreed to attend a meeting.<sup>163</sup> When Byrne failed to show, Avon Products fired him for not showing up at the meeting and for sleeping during work.

The Northern District of Illinois entered summary judgment in favor of Avon Products, but the Seventh Circuit vacated and remanded. The Seventh Circuit agreed that, under the ADA, Byrne was not qualified for the job because he could not work. Although Byrne could propose a part-time accommodation, employers under the ADA are not required to accommodate an employee who cannot work *at all* for an extended period of time.<sup>164</sup> Extended leave resulting from a “serious health condition” is instead governed by the FMLA.<sup>165</sup> It is clear in the Seventh Circuit that an employee claiming to be sick is not enough to put an employer on notice of an employee’s desire to use Family Medical Leave;<sup>166</sup> however, “it is not beyond the bounds of reasonableness to treat a dramatic change in behavior as notice of a medical problem.”<sup>167</sup> The court decided that a reasonable jury *could* conclude that Byrne’s change in behavior put his employer

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157. *Id.* (quoting *Flores*, 521 U.S. at 520).

158. *Id.* at 1978-82.

159. *Id.* at 1977 (citing U.S. CONST. amend. XIV, § 5).

160. *Id.* at 1981.

161. *Id.* at 1978.

162. 328 F.3d 379 (7th Cir. 2003).

163. *Id.* at 380.

164. *Id.* at 381.

165. *Id.* (quoting 29 U.S.C.A. § 2612(a)(1)(D) (2003)).

166. *Id.* (citing *Collins v. NTN-Bower Corp.*, 272 F.3d 1006 (7th Cir. 2001)).

167. *Id.* at 381.

on notice of Byrne's need for medical leave. In the alternative, a jury could have concluded that it was not feasible for a person with "major depression" to give notice. "Avon should have classified this period as medical leave—if Byrne indeed was unable to give verbal or written notice, or if the sudden change in his behavior was itself notice of his mental problem."<sup>168</sup>

## VII. FAIR LABOR STANDARDS ACT: PROCEDURE

Recently, the United States Supreme Court, in *Breuer v. Jim's Concrete, Inc.*,<sup>169</sup> affirmed an Eleventh Circuit decision, holding an FLSA action could be removed from state to federal court. Section 216(b) of the FLSA provides that an action "may be *maintained* . . . in any Federal or State court of competent jurisdiction."<sup>170</sup> That language, the Court held, does not prohibit removal of a civil action to a federal district court with original jurisdiction, pursuant to 28 U.S.C. § 1441(a).<sup>171</sup> Section 1441(a) allows any civil action to be removed to a district court with original jurisdiction unless an Act of Congress expressly provides otherwise;<sup>172</sup> and the Court held the language of § 216(b) did not expressly provide otherwise.

## VIII. EMPLOYEE RETIREMENT INCOME SECURITY ACT

### A. *Treating Physician Rule Not Applicable Under ERISA*

In *Black & Decker Disability Plan v. Nord*,<sup>173</sup> a unanimous United States Supreme Court decided the "treating physician rule," which gives deference to the determination of a treating physician over other examining doctors, has no place in ERISA benefits plans. ERISA, the Court held, does not require such a rule, which historically was adopted for determining Social Security disability entitlement.<sup>174</sup> The employee in *Black & Decker* sued under ERISA after Black & Decker denied his disability welfare benefits based on an independent examination by a doctor the employee was referred to by Black & Decker.<sup>175</sup> The Supreme Court vacated the Ninth Circuit's decision, stating "courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician; nor may courts impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation."<sup>176</sup>

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168. *Id.* at 382.

169. 123 S. Ct. 1882 (2003).

170. Fair Labor Standards Act, 29 U.S.C. §216(b) (2004) (emphasis added).

171. *Breuer*, 123 S. Ct. at 1884.

172. *Id.*; see also 28 U.S.C. §1441(a) (2004).

173. 123 S. Ct. 1965 (2003).

174. *Id.* at 1967, 1969.

175. *Id.* at 1968.

176. *Id.* at 1972.



*B. Any Willing Provider Laws Not Preempted by ERISA*

In *Kentucky Ass'n of Health Plan, Inc. v. Miller*, the Supreme Court reviewed Kentucky's "Any Willing Provider" laws, deciding they were regulated by insurance and, thus, not pre-empted by ERISA.<sup>177</sup> ERISA pre-empts any state laws "insofar as they may now or hereafter relate to any employee benefit plan."<sup>178</sup> It does not, however, pre-empt state laws regulated by insurance.<sup>179</sup> "[A] state law must be 'specifically directed toward' the insurance industry in order to fall under ERISA's savings clause."<sup>180</sup> Generally, Kentucky's Any Willing Provider laws prohibited health insurers from discriminating against any provider or licensed chiropractor within the geographic region who is willing to abide by the terms of the health plan.<sup>181</sup> Because these laws force health plans to allow any willing provider to participate, the Petitioners fear the laws will increase providers and decrease efficiency.<sup>182</sup> The plans control costs by obtaining a small number of doctors to care for a large number of patients, something Kentucky's Any Willing Provider laws hinder.<sup>183</sup> The Petitioners filed suit claiming ERISA pre-empted Kentucky's Any Willing Provider laws, but the Supreme Court did not agree.

Today we make a clean break from the McCarran-Ferguson factors and hold that for a state law to be deemed a "law . . . which regulates insurance" under § 1144(b)(2)(A), it must satisfy two requirements. First, the state law must be specifically directed toward the entities engaged in insurance. . . . Second, as explained above, the state law must substantially affect the risk pooling arrangement between the insurer and the insured. Kentucky's law satisfies each of these requirements.<sup>184</sup>

*C. Future Promise to Develop Severance Plan Not Enforceable*

Although courts have decided benefits plans do not have to be written to be enforced by ERISA, the Seventh Circuit held in *Brines v. Xtra Corp.* that a statement in a benefits plan that Xtra Corporation "will develop" a separation program was not enforceable.<sup>185</sup> The court interpreted the statement under common-law contracts, deciding the statement was not a promise but instead a

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177. 123 S. Ct. 1471 (2003).

178. *Id.* at 1475 (quoting 29 U.S.C. § 1144(a) (2003)).

179. *Id.* (citing 29 U.S.C. § 1144(b)(2)(A)).

180. *Id.* (quoting *Pilot Life Ins. Co. v. Dedeaux*, 107 S. Ct. 1549 (1987)).

181. *Id.* at 1473-74.

182. *Id.* at 1474.

183. *Id.*

184. *Id.* at 1479 (citations omitted).

185. 304 F.3d 699, 701 (7th Cir. 2002) (citing *Diak v. Dwyer, Costello & Knox, P.C.*, 33 F.3d 809, 811-12 (7th Cir. 1994)).

prediction.<sup>186</sup> The Seventh Circuit also decided the company's practice of paying severance packages did not create a contract, stating "[t]he normal understanding of severance pay (when not provided for in a written plan), as of bonuses, is that it is at the discretion of the employer; there is nothing here to upset that understanding."<sup>187</sup>

#### *D. Scope of Review*

The Indiana Court of Appeals in *Wheatley v. American United Life Insurance Co.*<sup>188</sup> determined the scope of review it wished to follow for an ERISA claim under a de novo standard in Indiana. Although many federal circuit courts have addressed the issue before, this was a first in Indiana. While the United States Supreme Court decided an ERISA denial of benefits claims should be reviewed de novo (unless the plan states otherwise),<sup>189</sup> the circuits disagree as to what evidence should be included in that de novo review. Where the Third and Eleventh Circuits admit additional evidence that was not presented to the plan administrator, the Sixth Circuit will not consider any evidence not presented to the plan administrator.<sup>190</sup> The Eighth and Fourth Circuits take a middle-of-the-road approach, allowing the introduction of additional evidence not presented to the administrator only when it is necessary for an adequate de novo review.<sup>191</sup> The Seventh Circuit uses a very similar approach, allowing additional evidence "when necessary 'to enable it to make an informed and independent judgment.'"<sup>192</sup> After reviewing these circuit court decisions, the court of appeals, citing Indiana's general rule that leaves trial courts the discretion to admit or deny evidence, held Indiana trial courts are allowed to look beyond a benefits administrator's presented evidence "only when necessary to conduct an adequate de novo review of the administrator's determination."<sup>193</sup> The Court went on to specify, "this discretion should only be exercised when good cause exists."<sup>194</sup> Thus, it is now clear that Indiana trial courts hearing an ERISA claim under a de novo standard have the discretion to allow additional evidence not presented to the plan administrator if good cause can be shown to allow such evidence.

#### *E. Meaning of "Transfer" Under the Multi-Employer Pension Plan Amendment Act*

The definition of "transfer," meaning transferring work from Funded to non-Funded workers, under the Multi-Employer Pension Plan Amendment Act

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186. *Id.*

187. *Id.* at 704.

188. 792 N.E.2d 927 (Ind. Ct. App. 2003).

189. *Id.* at 929-30 (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989)).

190. *Id.* at 930.

191. *Id.* at 930-31.

192. *Id.* (quoting *Casey v. Uddeholm Corp.*, 32 F.3d 1094, 1099 (7th Cir. 1994)).

193. *Id.* at 931.

194. *Id.*



("MPPAA")<sup>195</sup> was addressed for the first time by a federal court in *Nestlé Holdings, Inc. v. Central States, Southeast & Southwest Areas Pension Fund*.<sup>196</sup> More specifically, the Seventh Circuit in *Nestlé* addressed whether the work previously completed by union employees who were funded by Nestlé's multi-employer plan was transferred to non-union employees within the meaning of the MPPAA, thus incurring withdrawal liability.<sup>197</sup> In 1995, Nestlé closed two trucking terminals, one in Missouri and one in Illinois.<sup>198</sup> Because it had lost a shipping contract, the employees that were not funded by Nestlé's multi-employer pension plan did not increase their workload; however, union employees that were funded by the plan were terminated and non-funded employees took some of the work previously performed by the union employees funded by the plan.<sup>199</sup>

"The MPPAA requires a company that withdraws from a multi-employer pension plan covered by ERISA to pay 'withdrawal liability,' which is intended to cover that company's share of the unfunded vested benefits that exist when the company withdraws."<sup>200</sup> According to the MPPAA, withdrawal liability may be assessed for either a complete or partial withdrawal.<sup>201</sup> A partial withdrawal will occur when the employer permanently transfers work of the same type that was previously in the jurisdiction of a collective bargaining agreement where contributions to a plan were required.<sup>202</sup>

Pursuant to the MPPAA, the Fund assessed nearly \$1.3 million in withdrawal liability after Nestlé terminated the fund employees.<sup>203</sup> After the Fund upheld the assessment of withdrawal liability, Nestlé demanded an arbitrator, who subsequently found Nestlé transferred work from Funded employees to non-Funded employees.<sup>204</sup> Because the work previously completed by union employees who were funded by the plan was "reassigned after closure of the company's transportation terminals," the district court, too, found a transfer, reasoning the work was "not essentially different in character."<sup>205</sup> At the Seventh Circuit, Nestlé argued the non-funded employees actually worked less after the closings, which, it argued, meant it did not transfer work to non-Funded employees.<sup>206</sup> However, the Court noted that just because the terminals closed didn't mean the work ceased.<sup>207</sup> In fact, "the arbitrator specifically noted that at

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195. See 29 U.S.C. § 1385(b)(2)(A)(i) (2004). The MPPAA is an amendment to ERISA.

196. 342 F.3d 801, 804-05 (7th Cir. 2003).

197. *Id.* at 804.

198. *Id.* at 802-03.

199. *Id.*

200. *Id.* at 804 (citing 29 U.S.C. §§ 1381, 1385, 1391).

201. *Id.* (citing 29 U.S.C. §§ 1383, 1385).

202. *Id.* (citing 29 U.S.C. § 1385(b)(2)(A)(i)).

203. *Id.* at 803.

204. *Id.*

205. *Id.* at 804.

206. *Id.* at 805-06.

207. *Id.* at 806.

least one non-union driver who . . . did not report to the [closed] terminal, [and] continued to drive in the lanes previously assigned to union members after the closures.”<sup>208</sup> Before the closure, the non-Funded employee shared that particular drive with Funded employees; whereas after the closure, he was selected to drive even if one of the terminated Funded employees would have been chosen.<sup>209</sup> Holding Nestlé transferred work from Funded to non-Funded employees, thus incurring partial withdrawal liability under the MPPAA, the Seventh Circuit stated “Nestlé could have reduced its workforce across the board, including both Fund and non-Fund employee drivers, instead of only targeting union-represented drivers.”<sup>210</sup>

#### IX. UNEMPLOYMENT BENEFITS: DEFINITION OF UNEMPLOYED

According to the Indiana Court of Appeals, an employer who places an employee on administrative leave and provides partial pay is not required to pay state unemployment compensation.<sup>211</sup> The court in *City of Bloomington v. Review Board of the Department of Workforce Development* reviewed a city employee’s employment status, holding he was not entitled to unemployment benefits because he was not unemployed, as defined by Indiana Code section 22-4-14-1.<sup>212</sup> The Indiana Code provides unemployment benefits only for unemployed individuals, and further “provides that an individual is employed during ‘[p]eriods of . . . leave with pay.’”<sup>213</sup> Thus, the Indiana Court of Appeals held the employee was not unemployed because he was on administrative leave from the fire department pending a resolution of domestic violence charges. Further, the court held the employee was not entitled to *partial* unemployment benefits even though he was receiving partial pay during his leave. Partial employment, the court explained, was defined by the Act as an employee working less than his normal full week “‘because of lack of available work.’”<sup>214</sup> The employee was on partial pay for disciplinary reasons, not from lack of work. Thus, the court denied the city employee’s request for unemployment compensation and concluded allowing unemployment benefits to employees who are on leave from their own fault is against the purpose of the Act.<sup>215</sup>

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208. *Id.*

209. *Id.*

210. *Id.* at 807.

211. *City of Bloomington v. Review Bd. of the Dep’t of Workforce Dev.*, 794 N.E.2d 1143 (Ind. Ct. App. 2003).

212. *Id.* at 1146 (citing IND. CODE § 22-4-14-1 (2003)).

213. *Id.* (quoting IND. CODE § 22-4-11-1)

214. *Id.* (quoting IND. CODE § 22-4-3-2).

215. *Id.* at 1146-47. “I.C. § 22-4-1-1 identifies a primary purpose of the Act as: ‘to provide for payment of benefits to persons unemployed through no fault of their own.’” *Id.* (quoting IND. CODE § 22-4-1-1.)



## X. FEDERAL EMPLOYERS' LIABILITY ACT

The United States Supreme Court made an important determination on damages in this survey period under the Federal Employers' Liability Act ("FELA"). The Court allowed the plaintiffs, who suffered from work-related asbestosis, in *Norfolk & Western Railway Co. v. Ayers*<sup>216</sup> to recover for mental anguish damages attributed to the fear of developing cancer if they could prove their fears were "genuine and serious."<sup>217</sup> FELA allows employees of common carrier railroads to sue their railroad employer for injuries they incur "in whole or part" from the employer's negligence.<sup>218</sup> The Court in *Ayers* reviewed its prior case law in this area, stating courts should follow the zone-of-danger test for plaintiffs who suffer *only* an emotional injury.<sup>219</sup> In this case, however, the plaintiffs had developed asbestosis, a physical injury, not merely emotional injuries. Thus, the Court distinguished between the two, stating "pain and suffering damages may include compensation for fear of cancer when that fear 'accompanies a physical injury.'"<sup>220</sup> Although Norfolk argued asbestosis cannot cause cancer, attempting to separate the physical injury of asbestosis from the fear of cancer, the Court dismissed the argument pointing to statistics showing ten percent of asbestosis sufferers die from cancer.<sup>221</sup> The Court stated: "In light of this evidence, an asbestosis sufferer would have good cause for increased apprehension about his vulnerability to another illness from his exposure. . . ."<sup>222</sup>

In addition to allowing mental anguish damages, the Court also determined apportionment of fault. An additional impingement on defense attorneys, the Court held the jury should not apportion fault to companies outside of the railroad company who exposed the plaintiff so long as the railroad itself was negligent.<sup>223</sup> Reinforcing its prior decision, the Court stated, "[t]he FELA's express terms . . . allow a worker to recover his entire damages from a railroad whose negligence jointly caused an injury . . . thus placing on the railroad the burden of seeking contribution from other tortfeasors."<sup>224</sup> One plaintiff in the case was "exposed to asbestos at Norfolk for only three months," was exposed at other jobs for thirty-three years, and still received the benefit of non-apportionment.<sup>225</sup>

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216. 123 S. Ct. 1210 (2003).

217. *Id.* at 1223.

218. *Id.* at 1217; *see also* The Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 (2004).

219. *Ayers*, 123 S. Ct. at 1218.

220. *Id.* (quoting *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424, 430 (1997)).

221. *Id.* at 1221-22.

222. *Id.* at 1222.

223. *Id.* at 1228.

224. *Id.* at 1215.

225. *Id.* at 1216.

XI. OTHER STATE LAW DEVELOPMENTS: CASES OF FIRST IMPRESSION  
WITH THE INDIANA COURT OF APPEALS

During this past survey period, the Indiana Court of Appeals heard two important employment law cases of first impression. It interpreted the breadth of the Indiana whistle-blower statute,<sup>226</sup> and decided an employer had a legitimate protectible interest in its former employee sufficient to enforce a covenant-not-to-compete.<sup>227</sup>

For the first time, in *Coutee v. Lafayette Neighborhood Housing Services, Inc.*, the Indiana Court of Appeals interpreted Indiana's whistle-blower statute.<sup>228</sup> Indiana Code section 22-5-3-3 protects employees of private sector employers under public contract and prevents employees from being fired for reporting the existence of a violation of law or the misuse of public resources concerning the execution of the public contract.<sup>229</sup> The plaintiff claimed she was fired in violation of the Indiana whistle-blower statute when she wrote a letter to her executive director discussing her manager's ineffective management style.<sup>230</sup> The court of appeals interpreted "misuse of public resources" to require "a direct expenditure or use of public funds, property, or resources for a purpose other than that contemplated by the contract in question."<sup>231</sup> Thus, the plaintiff's act of blowing the whistle on her boss's management style does not, according to the Indiana Court of Appeals, violate Indiana's whistle-blower statute.<sup>232</sup>

In another factual first for the Indiana Court of Appeals, the court heard a case arising from a dispute between employer, WOWO radio station in Fort Wayne, Indiana, and its former conservative talk show host employee, Dave Macy. The Indiana Court of Appeals decision in *Pathfinder Communications Corp. v. Macy* allows Indiana employers to protect their legitimate interests in celebrity employees through enforcing covenants-not-to-compete under certain circumstances. In an effort to increase ratings, WOWO changed the structure of Macy's morning show from the controversial "Macy in the Morning" format, for which Macy is known, to a more news-oriented approach. Subsequently that year, WOWO fired him for falsifying program logs.<sup>233</sup> Macy had signed a covenant-not-to-compete, but took a job working for a competitor in the same market.<sup>234</sup> WOWO sued to enforce its covenant. Because the Indiana Court of Appeals had yet to encounter a case factually similar to this one, it reviewed

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226. See *Coutee v. Lafayette Neighborhood Hous. Servs., Inc.*, 792 N.E.2d 907 (Ind. Ct. App. 2003) (interpreting IND. CODE § 25-5-3-3).

227. *Pathfinder Communications Corp. v. Macy*, 795 N.E.2d 1103 (Ind. Ct. App. 2003).

228. 792 N.E.2d at 907.

229. *Id.* at 912 (citing IND. CODE § 22-5-3-3).

230. *Id.* at 910.

231. *Id.* at 914.

232. *Id.*

233. *Pathfinder Communications Corp. v. Macy*, 795 N.E.2d 1103, 1107-08 (Ind. Ct. App. 2003).

234. *Id.* at 1107-08.



other state case law before determining that WOWO had a legitimate protectible interest in its employee, Dave Macy, even though it no longer had a protectible interest in the "Macy in the Morning" talk show format because WOWO had abandoned that specific format of the talk show. The court noted that Macy was unknown in the Fort Wayne market before WOWO hired and promoted his on-air show. It also noted Macy took a job with a competitor of WOWO using a similar talk show format during the same morning drive time period.<sup>235</sup> The court then proceeded to review the covenant-not-to-compete and determined it was unreasonably overbroad because it did not allow Macy to engage in *any* activity with a competitor radio station.<sup>236</sup> Nevertheless, as with most overbroad covenants, the court "blue-penciled" the unreasonable parts of the covenant, ultimately leaving a covenant forbidding Macy from working as an on-air personality for one of the listed competitors for a period of twelve months.<sup>237</sup>

## XII. CONCLUSION: THE WATCH LIST

Although the United States Supreme Court "decline[d] to review dozens of employment law cases" when the 2003-2004 term opened,<sup>238</sup> it does review some pertinent employment law cases each year. It has accepted several employment cases for review during the upcoming year. These cases involve issues ranging from whether constructive discharge is a "tangible employment action" to whether a sole shareholder can be a participant in an ERISA plan. The Court's rulings on these and other pertinent employment issues could modify the legal landscape in the ever-evolving area of employment law.

The United States Supreme Court will answer the following questions in its upcoming term:

### *A. Does the ADEA Permit a Cause of Action for Reverse Age Discrimination?*<sup>239</sup>

In the upcoming session, the Court will determine whether employees within the protected age class of forty years and over have a valid cause of action under the ADEA against an employer who discriminated against them by awarding more favorable treatment to those in the protected class who are older.<sup>240</sup> The

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235. *Id.* at 1113.

236. *Id.* at 1114.

237. *Id.* at 1115.

238. *Supreme Court Opens Term, Asks for Government's Views in Title IX Case*, BNA LAB. REP. AA-1 (2003).

239. See *Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 1786 (2003).

240. See *id.* The Sixth Circuit has been reversed by the United States Supreme Court's recent decision in *General Dynamics Land Systems, Inc. v. Cline*, 124 S. Ct. 1236 (2004). Reversing the Sixth Circuit, the Supreme Court held "the text, structure, purpose, and history of the ADEA, along with its relationship to other federal statutes, as showing that the statute does not mean to stop an employer from favoring an older employee over a younger one." *Id.* at 1248-49.

Sixth Circuit Court of Appeals interpreted the ADEA to provide a cause of action for employees in the protected age group who claim their employer discriminated against them by providing more favorable treatment to older employees also within the protected group.<sup>241</sup>

*B. Are Racial Harassment and Termination Claims Under § 1981 Subject to the Four-Year "Catchall" Statute of Limitations Provided for Under § 1658 for All Federal Civil Actions?*<sup>242</sup>

Section 1658 calls for a four-year statute of limitations for any "civil action arising under an Act of Congress" that was enacted after December 1, 1990.<sup>243</sup> The Seventh Circuit in *Jones v. R.R. Donnelley & Sons, Co.* decided § 1658 was not applicable to a claim arising from § 1981, even though § 1981 was amended in 1991 (after the 1990 enactment of the catch-all statute of limitations). Although the amendment increased the rights granted under it to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," the Seventh Circuit decided the § 1658 "catch all" statute of limitations was meant to be used for new causes of action, not amended causes of action like § 1981.<sup>244</sup>

*C. Are Plaintiffs Whose Social Security Numbers Were Disclosed in Violation of the Privacy Act Entitled to Damages Even Though They Did Not Suffer Any Actual Damages?*<sup>245</sup>

To facilitate the processing of black lung compensation claims, the Department of Labor's Office of Workers' Compensation Programs and its Division of Coal Mine Workers' Compensation asks applicants to voluntarily provide their social security numbers, informing them that it may be used to facilitate benefits determinations.<sup>246</sup> Administrative Law Judges sent to applicants, their attorneys, and their employers, a single document with the applicants' social security numbers, which were subsequently sometimes published in benefits decision reporters.<sup>247</sup> The plaintiffs alleged the publication of their social security numbers caused them emotional distress. However, the Fourth Circuit Court of Appeals held the claimants had to sustain actual damages

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241. *Cline*, 296 F.3d at 466.

242. *See Jones v. R.R. Donnelley & Sons, Co.*, 305 F.3d 717 (7th Cir. 2002), *cert. granted*, 123 S. Ct. 2074 (2003).

243. 28 U.S.C. § 1658 (2002).

244. *Jones*, 305 F.3d at 726 (quoting 42 U.S.C. § 1981(b)).

245. *See Doe v. Chao*, 306 F.3d 170 (4th Cir. 2002), *cert. granted*, 123 S. Ct. 2640 (2003). The United States Supreme Court recently affirmed the Fourth Circuit, holding the claimants were not entitled to damages because they failed to show they suffered actual damages as a result of the violation. *See Chao*, 124 S. Ct. at 2640.

246. *Chao*, 306 F.3d at 175.

247. *Id.*



to receive the statutory \$1000 minimum damage for violating the Privacy Act.<sup>248</sup>

*D. Is a Sole Shareholder a Participant in an ERISA plan, Such That He Can Block a Bankruptcy Trustee from Taking a Loan He Repaid to the Pension Plan?*<sup>249</sup>

A federal bankruptcy trustee wanted a court order setting aside a payment made by a shareholder/debtor to his corporation's pension plan only three weeks before bankruptcy.<sup>250</sup> ERISA requires profit-sharing pension plans to contain spendthrift clauses, protecting the plan from alienation or assignment except for loans to participants.<sup>251</sup> Yates was the sole owner of a professional corporation, the plan's administrator and the plan's trustee; there were a total of four participants to the plan.<sup>252</sup> Because "a sole shareholder cannot qualify as a 'participant or beneficiary' in an ERISA pension plan," and "does not have standing under the ERISA enforcement mechanisms," the Fourth Circuit Court of Appeals held Yates, as a sole shareholder, could not enforce the spendthrift clause under ERISA.<sup>253</sup>

*E. Is Constructive Discharge a "Tangible Employment Action" Such That if Committed by a Supervisor, an Employer Would Be Strictly Liable Under Ellerth and Faragher?*<sup>254</sup>

In April of 2003, the Third Circuit held constructive discharge was a "tangible employment action" within the meaning of *Ellerth* and *Faragher*.<sup>255</sup> If the United States Supreme Court affirms the Third Circuit Court of Appeal's decision, the ramifications for employers is great. Currently under *Ellerth* and *Faragher*, employers are not able to raise an affirmative defense to liability or damages for sexual harassment of supervisors.<sup>256</sup> Thus, if constructive discharge is defined by the Supreme Court as a tangible employment action, employers will be strictly liable for supervisors who are found to have constructively discharged an employee.

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248. *Id.* at 175, 178-79.

249. *See In re Yates*, 287 F.3d 521 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 2637 (2003). On March 2, 2004, the Supreme Court reversed the Sixth Circuit Court of Appeals and held that Yates, as a working sole owner of a professional corporation, was a participant in the ERISA pension plan. *See Yates v. Hendon*, 124 S. Ct. 1330 (2004).

250. *In re Yates*, 287 F.3d at 524.

251. *Id.*

252. *Id.*

253. *Id.* at 526 (quoting *Agrawal v. Paul Revere Life Ins. Co.*, 205 F.3d 297 (6th Cir. 2000)).

254. *See Suders v. Easton*, 325 F.3d 432 (3rd Cir.), *cert. granted*, *Pa. State Police v. Suders*, 124 S. Ct. 803 (2003).

255. *Id.* at 452.

256. *See id.* at 434-35 (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)).

*F. Does a Pension Plan Amendment That Effectively Reduces Early Retirement Benefits Violate ERISA's Anti-Cutback Rule?*<sup>257</sup>

After retiring at an early age, the plaintiffs in *Heinz v. Central Laborers' Pension Fund* obtained jobs as construction supervisors, which the plan did not define as "disqualifying employment." Thus, the plaintiffs received monthly pension benefits until 1998 when their benefits were suspended because the plan was amended to define "disqualifying employment" to include "work 'in any capacity in the construction industry.'"<sup>258</sup> The Seventh Circuit Court of Appeals held this amendment violated ERISA's anti-cutback rule, which does not allow a decrease of accrued benefits of a participant under the plan.<sup>259</sup>

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257. See *Heinz v. Cent. Laborer's Pension Fund*, 303 F.3d 802 (2002), *cert. granted*, 124 S. Ct. 803 (2003).

258. *Heinz*, 303 F.3d at 803 (quoting the retirement plan in question).

259. *Id.* at 804, 813.



# ENVIRONMENTAL LAW DEVELOPMENTS: HOPE AND AMBIGUITY IN ACHIEVING THE OPTIMUM ENVIRONMENT

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## INTRODUCTION

The body of law that governs environmental regulation and litigation in Indiana expanded and evolved during the survey period. Indiana appellate decisions lead the nation in supporting insurance coverage for environmental claims, and a new decision further advances that law. Lawsuits against Indiana utilities by the federal government alleging violations of the Clean Air Act ("CAA") potentially involve expenditures in the hundreds of millions of dollars. The intensity of litigation involving such massive financial exposure and the complexity of the CAA and its regulations have spawned important decisions in this area. Other significant environmental issues litigated in Indiana's appellate courts during the survey period include development activities in isolated wetlands, citizen standing to challenge an agency action on environmental permits, proof of personal injury arising from exposure to chemicals in the environment, and significant expansion of a city's right to use its power to seek damages and abatement of a public nuisance. The legal developments summarized below have far-reaching effects on the lives and livelihoods of Indiana citizens.

### I. RECENT DEVELOPMENTS IN INDIANA ENVIRONMENTAL INSURANCE LAW—FUNDS FOR ENVIRONMENTAL CLEANUPS

On January 16, 2004, the Indiana Court of Appeals issued a decision, *PSI Energy, Inc. v. Home Insurance Co.*, that adds to a body of appellate law that makes Indiana one of the most favorable states in the nation for policyholders to obtain insurance coverage for environmental claims.<sup>1</sup> This law gives Indiana a unique and important tool to meet the enormous costs which have been imposed by the revolution in environmental regulation.

#### A. The Sea Change in Environmental Regulation

Indiana's industrial history has left a legacy of significant environmental cleanup needs. Whether it is a corner gas station, a failed recycling facility, a municipal landfill, or a major factory, the reassessment of the nation's environmental requirements over the past thirty or more years has required a vast social investment. Even routine small scale cleanups run into hundreds of thousands of dollars. A major remediation project at a large factory easily can

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1. 801 N.E.2d 705 (Ind. Ct. App. 2004).

cost tens of millions of dollars.

Regardless of whether change is mandated by the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA"),<sup>2</sup> the "Superfund" statute, the Resource Conservation and Recovery Act ("RCRA"), the hazardous waste regulatory statute, or any of the myriad of other government remediation statutes, or by common law or statutory remedies,<sup>3</sup> all of this cleanup costs money. In the main, it costs money which no one anticipated having to spend. The liability for this unprecedented wave of cleanups is retroactive and strict, and it is imposed for practices which were perfectly legal when undertaken.

Consider, for example, a typical Superfund cleanup at a landfill. The landfill was fully licensed and inspected by state and local agencies. It land disposed a vast array of materials, including many, such as solvents, which, based upon our present understanding of the impact and operation of the chemicals in the environment, we no longer land dispose. Under CERCLA present and past owners and operators of the landfills and generators and transporters of the wastes to the landfill must pay the cleanup costs.<sup>4</sup>

Over the last forty years of the twentieth century, our environmental sensibilities have changed. From *Silent Spring* to Love Canal, to the Superfund and RCRA statutes, we witnessed a dramatic shift from subjective qualitative to "objective," largely quantitative regulation of the environment. While nuisance statutory and case law and anti-pollution statutes<sup>5</sup> were enacted prior to this time, they were focused on acute, tangible instances of pollution which were detectable by ordinary sight, smell, or other senses. The notion that such work was the business of full-time state regulatory agencies, much less a federal agency, is a novel development of the years since 1970.<sup>6</sup>

In part, this shift was the result of scientific progress, not only in the understanding of the environmental effects of compounds, but also in our capacity to measure the presence of substances in the environment in increasingly smaller quantities. This allowed objective quantitative analysis without which

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2. 42 U.S.C. § 9601-9675 (2003).

3. *E.g.*, Indiana's relatively new Environmental Legal Action Statute, IND. CODE § 13-30-9-2 (2003) (allowing a "person [to] bring an environmental legal action against a person who caused or contributed to a release of a hazardous substance . . . into the . . . soil or groundwater to recover reasonable costs of a removal or remedial action involving the hazardous substance").

4. 42 U.S.C. § 9607.

5. *See, e.g.*, IND. CODE § 32-30-6-6 (Indiana's nuisance statute first passed in 1881, which allows a citizen to bring an action for anything which is "injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property"). Another example is Indiana's first Stream Pollution Control Act, IND. CODE § 13-18-3-1, which is intended to prevent any conduct which would injure "fish life or any beneficial animal or vegetable life."

6. Not surprisingly, this corresponds to the first wide-spread inclusion of environmental law courses in law school curriculum. One of the co-authors of this Article took the first environmental law course taught at Harvard Law School in 1978, offered only via mimeographed materials, because no acceptable text books on the subject were available.



broad-scale regulation is impossible. Without data reports neither contamination nor cleanup levels can be confirmed. This new possibility enhanced a heightened public and political appetite to acquire more environmental protection in measurable quantities.

Environmental protection, like national defense, is frequently cited as the classic paradigm of a public good. That is, everyone wants it, but the market choices of individuals and industry do not necessarily produce an optimum quantity. This is because an individual can freely enjoy a clean environment if someone else pays to maintain it. Individuals have little incentive to pay for marginal environmental improvements, and if no one has such incentives, we all may end up with less than what we want. Hence, a leading role for government developed to achieve, in some rough measure, the right amount of environmental protection, at least the optimum clean environment. This new role with new objective standards has produced a liability revolution.

But public goods still have costs. Somewhere, someone has to produce the resources to address the measure of what is clean enough. In the main, we have selected an individual attribution model, a model which seeks to attach the new costs to the original sources of what we lately have chosen to call unacceptable contamination.

This has been an imperfect attribution because it stretches back to attach present-day costs to conduct that occurred thirty to sixty or more years ago which typically was perfectly "legal" and not generally understood to be likely to result in significant damage or liability in the future. In a very real sense, this is both unfair and inefficient. The decision-makers, the companies, and the shareholders are only rarely the same entities as those when the choices were made. The impact of this falls upon not those who "benefited" from what has now resulted in cleanup costs, but upon those a generation or more removed from those choices.

For many insurance policyholders, this disproportionate unexpected imposition of costs is more than a theoretical problem. These costs can ruin a business, or sap all the value from a property. Fortunately, in Indiana, insurance purchased to protect against this type of cleanup liability and any other unexpected liability is available to help. To understand the intellectual foundation of this law, it is first necessary to grasp the unique nature of liability insurance policies.

### *B. The Nature of the Insurance Policy*

It is common to find statements in judicial opinions, even in Indiana, along the lines of insurance policies are contracts and are subject to all the ordinary rules of contract interpretation.<sup>7</sup> This is not really accurate. Insurance, especially in its modern pre-printed form, is not best described as a contract.

Insurance is a *product*—it is risk protection. It is not an individualized agreement, arrived at by free and open arm's length negotiations over crucial details such as those which might characterize a "real" contract. The insurance

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7. See, e.g., *Westfield Cos. v. Knapp*, 804 N.E.2d 1270, 1274 (Ind. Ct. App. 2004).



product is printed up in full, or nearly full, and final form. Generally, nothing more than the quantity purchased and the price paid are even discussed, much less negotiated. Even major insurers and their major corporate clients often do not obtain a clear understanding of what coverage is agreed upon (or *not* agreed upon) until the point of claim. Very often, the underwriting and claims wings of an insurer do not see the coverage in the same way. A partner of mine relates a story of an experienced policy underwriter justifying an ambiguous draft policy as follows: "We draft them this way so that we can say later that the policy means whatever we want it to mean." The lawyer present objected that this was not a sound way to design a policy. The story illustrates, however, how far from a classic contract insurance policies stray. Insurance companies do not even retain copies of these "contracts" for any significant length of time. On the policyholder side, the goal is usually an aggregate sum of the "best coverage we can get" or the "typical" or "usual" or "standard" coverage. There is no real closure or meeting of the minds.

The way in which insurance policies come into being also reflects their non-contractual nature. Normally, the person or entity desiring to protect itself from risk looks for insurance coverages. Usually with the assistance of a licensed insurance agent or broker, the prospective insured identifies the coverages desired and sets out to find them. Typically, there is an application, which frequently is filled out by the agent or broker. The application is then sent to one or more insurance companies (or "carriers"), which underwrite the application for the policy. During this underwriting process, the insurance company's underwriters evaluate the potential risk that the application appears to represent, determine if they will accept the risk, and, if so, with the help of the company's actuarial department, determine the price (or "premium"). The price (at least for liability coverage and for most other forms) is formula-driven. That is, the potential policyholder's amount of sales, total compensation, or number of employees will determine the premium price, based on a pre-set rate schedule for a specific category of business (e.g., manufacturers, offices, etc.), rather than on an individual assessment of operations. If the carrier accepts the risk, commonly the agent or broker is informed and will report back to the applicant that the agent or broker has "placed" the insurance with an insurance company or combination of companies for a proposed total premium. If the proposed policyholder approves of the price, the insurance deal is made, and the insurance company is bound to the risk.

After all of this, someone in the administration department of the insurance company pulls together an appropriate policy for the insured and mails it to the policyholder. At no point does the policyholder sign a contract. At most, the policyholder's signature is on the application. The policyholder's form of acceptance is payment of the premium. Indeed, the only signatures by the insurance carrier are pre-printed signatures of the president and the secretary of the insurance company. The policy may or may not be counter-signed with an original signature of the insurance broker or agent. Note that typically no lawyers have been involved in this process at all to this point.

There is nothing in law or common usage that makes the insurance coverage effective only upon the execution of a written contract. In many cases, the



insurance policy does not arrive until months or maybe years after the inception of the insurance coverage and sometimes does not arrive at all. Because of the way in which insurance is entered into and the fact that the policy may arrive much later, if ever, a rule has developed in Indiana, which provides that where there has been a parol acceptance of an insurance risk, "the contract in parol continues until the policy is delivered, when it is superseded by the policy."<sup>8</sup> The parties have probably never agreed to be bound in parol until the policy arrives in the mail; the policy just arrives in the mail.

There are other features of insurance policies that make them quite different from other types of contracts:

1. Policy forms are written by the insurance industry. Although they are not required to be followed, sample policy forms are prepared and filed with state insurance departments for approval and made available to all insurance companies through the Insurance Services Office, Inc. ("ISO"), headquartered in New York City. The ISO consults with a small number of selected insurance companies to draft these policy forms.

2. The insurance industry decides itself and without consultation with the market that certain coverages will be eliminated or modified.

3. The McCarran-Ferguson Act<sup>9</sup> provides a specific antitrust exemption for this process on the basis that insurance companies' coverages must be uniform in order to allow for coherent risk rating evaluations.

4. Extremely rarely is language contained in a policy actually negotiated between parties. The rare exception to this is called a "manuscripted" policy or endorsement.

5. As stated above, there is no requirement that the policyholder execute the policy.

### *C. Another Distinguishing Characteristic—Policy Interpretation Rules*

Courts sometimes say they use the same rules of contract interpretation for insurance policies that they have for other types of contracts.<sup>10</sup> However, while acknowledging that insurance policies are in certain respects like other contracts, the courts also have recognized that these policies are forms drafted by the insurance industry, and the courts have developed numerous specific rules governing their construction. The Indiana Supreme Court recently affirmed that such form policies and exclusions are strictly construed against insurers for just that reason: "This strict construal against the insurer is driven by the fact that the insurer drafts the policy and foists its terms upon the customer. 'The insurance companies write the policies: we buy their forms or we do not buy insurance.'"<sup>11</sup>

One major difference between the interpretation of general contracts and

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8. *W. Assurance Co. v. McAlpin*, 55 N.E. 119, 122 (Ind. App. 1899).

9. 15 U.S.C.A. § 1011-1013 (2003).

10. *E.g.*, *Stockberger v. Meridian Mut. Ins. Co.*, 395 N.E.2d 1272, 1277 (Ind. App. 1979); *Am. States Ins. Co. v. Aetna Life & Cas. Co.*, 379 N.E.2d 510, 516 (Ind. App. 1978).

11. *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 947 (Ind. 1996) (quoting *Am. Econ. Ins. Co. v. Liggett*, 426 N.E.2d 134, 142 (Ind. Ct. App. 1981)).



insurance contracts in Indiana is the absence of an "implied covenant of good faith" in general contracts in this state side by side with the imposition of an "implied covenant of good faith" on insurers. The law of general contract interpretation in Indiana is very traditional. While many states, including our neighbors, have adopted numerous rules concerning various implied covenants with respect to general contracts, including covenants of "good faith" and "fair dealing," the courts of Indiana have consistently and emphatically refused to do so in the absence of an ambiguous contract.<sup>12</sup>

On the other hand, under Indiana law, an insurance company has a "special relationship" with its insureds that in many respects is fiduciary in nature and requires the insurer to deal with its policyholders in "good faith."<sup>13</sup> A breach of the obligation of good faith by the insurer may give rise to a tort action for compensatory damages or an action for punitive damages.<sup>14</sup> Factors that help determine whether an insurance company has acted in good faith with respect to policy interpretation include whether the insurer has taken inconsistent positions with respect to the same policy language, whether the insurer has a factual basis for its coverage position, whether the insurer has any legal support for its position, and the nature and extent of any investigation conducted prior to arriving at the coverage position.

Despite the occasional nod to the supposed contractual nature of an insurance policy, the cases actually show, on the whole, that an insurance policy is very different from an ordinary contract. For example "[a]n insurance policy should be so construed as to effectuate indemnification . . . rather than to defeat it."<sup>15</sup> "This is particularly true where a policy provision excludes coverage."<sup>16</sup> An exclusionary clause must "clearly and unmistakably" bring the excluded condition within its scope to be effective.<sup>17</sup>

Terms in an insurance contract may not be construed in a manner which is "repugnant to the purposes of the policy as a whole."<sup>18</sup> Policy terms are interpreted from the perspective of an ordinary policyholder of average intelligence.<sup>19</sup> Terms are given a consistent meaning throughout an insurance

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12. See *Rothe v. Revco D.S., Inc.*, 976 F. Supp. 784, 794-95 (S.D. Ind. 1997); *First Fed. Sav. Bank v. Key Mkts., Inc.*, 559 N.E.2d 600, 604 (Ind. 1990).

13. *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 518-19 (Ind. 1993).

14. *Id.*

15. *Masonic Accident Ins. Co. v. Jackson*, 164 N.E. 628, 631 (Ind. 1929); see also *Tate v. Secura*, 587 N.E.2d 665, 668 (Ind. 1992); *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985).

16. *Travelers Indem. Co. v. Summit Corp. of Am.*, 715 N.E.2d 926, 936 (Ind. Ct. App. 1999).

17. *Masonic*, 164 N.E. at 631 (coverage "will not be destroyed by language of exception, unless such exception shall be clear and free from reasonable doubt"); *Ashbury v. Ind. Union Mut. Ins. Co.*, 441 N.E.2d 232, 242 (Ind. Ct. App. 1982); *Huntington Mut. Ins. Co. v. Walker*, 392 N.E.2d 1182, 1185 (Ind. App. 1979).

18. *Prop. Owners Ins. Co. v. Hack*, 559 N.E.2d 396, 402 (Ind. Ct. App. 1990) (citing *J.B. Kramer Grocery Co., Inc. v. Glens Falls Ins. Co.*, 497 F.2d 709, 712 (8th Cir. 1974)).

19. *Ashbury*, 441 N.E.2d at 237.



policy.<sup>20</sup>

Ambiguity—which results in a construction in favor of coverage—can and will be found according to the following standard: “[A]n insurance policy is ambiguous if reasonable persons may honestly differ as to the meaning of the policy language.”<sup>21</sup> Words that have been accorded different meanings by different courts are ambiguous as a matter of law.<sup>22</sup> If there is *any* ambiguity in a policy term, it *must* be interpreted in favor of the insured and in favor of coverage, especially in an exclusion from coverage. The Indiana Supreme Court in *American States Insurance Co. v. Kiger* expressly affirmed this point: “Where there is ambiguity, insurance policies are to be construed strictly against the insurer. This is particularly true where a policy excludes coverage.”<sup>23</sup>

The policyholder need not prove that its suggested interpretation of a policy term is the *only* reasonable interpretation. If *any* reasonable construction of a term supports coverage, that construction governs as a matter of law.<sup>24</sup> “Where any reasonable construction can be placed on a policy that will prevent the defeat of the insured’s indemnification for a loss covered by general language, that construction will be given.”<sup>25</sup> To prevail in a denial of coverage, therefore, the insurer must demonstrate that its construction of insurance policy terms is the *only* plausible or reasonable reading of the policy language.

A policyholder’s expectations of coverage must be honored. Some jurisdictions label this approach as the “reasonable expectations doctrine.”<sup>26</sup> The Indiana Supreme Court has specifically endorsed adherence to the policyholder’s reasonable expectations of coverage: “In the instant case, based on the relevant policy language, Lilly could have reasonably formed an expectation that it was purchasing insurance coverage for all future liability arising from the manufacturing and selling of DES.”<sup>27</sup> These reasonable expectations are particularly important where policy language is ambiguous.<sup>28</sup>

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20. *Taracorp., Inc. v. NL Indus., Inc.*, 73 F.3d 738, 744 (7th Cir. 1996); *Thompson v. Amoco Oil Co.*, 903 F.2d 1118, 1121 (7th Cir. 1990).

21. *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985).

22. *See Summit*, 715 N.E.2d at 936; *Hartford Accident & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285, 295 (Ind. Ct. App. 1997); *Ind. Ins. Co. v. O.K. Transport, Inc.*, 587 N.E.2d 129, 132 (Ind. Ct. App. 1992); *Ind. Dep’t of Revenue v. RCA Corp.*, 310 N.E.2d 96, 99 (Ind. App. 1974), *rev’d on other grounds*, 520 N.E.2d 457 (Ind. Ct. App. 1988).

23. 662 N.E.2d 945, 947 (Ind. 1996); *see also* *Governmental Interins. Exch. v. City of Angola*, 8 F. Supp. 2d 1120, 1125 (N.D. Ind. 1998); *Lilly*, 482 N.E.2d at 470-71; *Summit*, 715 N.E.2d at 936.

24. *Lilly*, 482 N.E.2d at 471; *see also* *Am. Econ. Ins. Co. v. Liggett*, 426 N.E.2d 134, 144 (Ind. Ct. App. 1981).

25. *Liggett*, 426 N.E.2d at 144 (citation omitted).

26. Certain jurisdictions differ substantially from Indiana by explicitly rejecting adherence to the policyholder’s reasonable expectations of coverage. Examples of these jurisdictions include Colorado, Florida and Pennsylvania.

27. *Lilly*, 482 N.E.2d at 470.

28. *See Summit*, 715 N.E.2d at 936; *Great Lakes Chem. Corp. v. Int’l Surplus Lines Ins. Co.*,



The common thread among most of the rules in Indiana is that coverage will be effectuated whenever that is reasonably possible. These rules sensibly arise from the actual nature of the insurance policy. There is no real meeting of the minds when a policy is purchased; instead, a risk protection product is acquired. As in typical modern products liability law, risks arising from defects—ambiguity—in the product are properly assigned to the manufacturer, in this case the insurance company. The insurer is in the best position to avoid the risk through clarification of policy terms, and the risk of loss is most efficiently and fairly placed there. That is why these special rules of policy construction have developed and make sense.

#### *D. Indiana's Courts Respond to Environmental Liability Claims*

This law has had significant application as to environmental liability claims, which have presented an unanticipated loss not clearly addressed by the form policies. Insurance coverage law is a state-by-state determination. As in so many areas of the common law, Indiana jurisprudence on insurance coverage for environmental liability claims has developed through step by step analysis of specific issues. Numerous trial court decisions<sup>29</sup> preceded and followed these appellate landmarks.

But the first Indiana Supreme Court decision to address coverage for these claims was a major one that drew national attention. In *American States Insurance Co. v. Kiger*,<sup>30</sup> the Indiana Supreme Court, on direct appeal from the Hendricks Circuit Court to address an issue of "great public importance," held that both forms of the pollution exclusion found in comprehensive general liability ("CGL") policies from 1970 to the present were ambiguous. Therefore, these exclusions were construed in favor of coverage.

The early "standard" form (1970-1985) exclusion purports to bar coverage for any damage caused by discharge of contaminants, pollutants, or chemicals unless that release was "sudden and accidental." Insurers insisted "sudden" required a strictly temporal construction, meaning "all at once" and, thus, excluding gradual contamination, the predominant kind of contamination. The policyholder contended that "sudden," which was not defined in the policy, at least as plausibly means "unexpected."

The supreme court traced the history of the exclusion, noting that the insurance industry claimed its addition was a "mere clarification" that no coverage was provided for "expected and intended" damage.<sup>31</sup> The court noted that the industry's own construction of the language demonstrated the ambiguity

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638 N.E.2d 847, 850 (Ind. Ct. App. 1994); *Prop. Owners Ins. Co. v. Hack*, 559 N.E.2d 396, 402 (Ind. Ct. App. 1990).

29. See, e.g., *Riverside Oil, Inc. v. Federated*, 1994 U.S. Dist. LEXIS 20394 (C.D. Ill., Aug. 19, 1994) (discussing pollution and "owned property" exclusions and "personal injury" coverage); *Sam Winer & Co. v. Commercial Union*, No. 20D01-9207-CP-247 (Elkhart Super. Ct., Feb. 19, 1994) (discussing what constitutes a "suit" which triggers an insurers' duty to defend).

30. 662 N.E.2d 945, 947 (Ind. 1996).

31. *Id.* at 948.



of the phrase, "ambiguity that requires the Court to construe the insurance policy in favor of the insured and against the insurer who drafted it."<sup>32</sup> Thus the vast bulk of claims are covered unless the damage was expected and intended.

The court also assessed the "absolute" exclusion found in policies after 1985. This exclusion barred coverage for claims resulting from the discharge of "pollutants." "Pollutants" was defined as "any solid, liquid, gaseous or thermal irritant, or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. Waste includes materials to be recycled, reconditioned or reclaimed." The court held this definition is so overbroad that it is unenforceable since it would bar coverage for any claim involving virtually any substance.<sup>33</sup>

The supreme court's reasoning rested on the Indiana rules of insurance policy construction detailed above that favor coverage wherever that is reasonably possible, and which require that any ambiguity be interpreted in favor of the policyholder and in favor of coverage.<sup>34</sup>

*Kiger* has had an enormous impact.<sup>35</sup> It has made hundreds of millions of

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32. *Id.*

33. *Id.*

34. *Id.* at 947.

35. The Indiana legislature also rejected the insurance industry's effort to ensure enforcement of the absolute pollution exclusion in a literal, all-encompassing way. A bill was passed during the first 1997 legislative session, House Enrolled Act 1583, which attempted to reverse, prospectively, *Kiger*'s absolute pollution exclusion ruling and to codify broad application of the insurance industry's absolute pollution exclusion. The policy language at issue was identical in all important respects to the policy language in EMI's policies. Governor O'Bannon's veto message resoundingly rejected the bill:

A strong insurance industry is vital to the economic health of this state. The legislative and executive branches should encourage stability and clarity in the insurance market. Nevertheless, I am today vetoing House Enrolled Act 1583, which deals with environmental insurance.

House Enrolled Act 1583 would codify what should be a private contractual matter between an insurer and its insured. The bill provides that if an insurance policy contains certain prescribed language, or "substantially similar" language, then there is no coverage for losses arising out of the discharge or release of "pollutants." I believe that the definition of "pollutants" in this bill may increase the risk that insurers could deny coverage for claims having nothing to do with pollution in the ordinary sense of the word.

This bill could adversely affect large and small Indiana businesses who manufacture or use products that would be considered pollutants under this bill. A cross section of these businesses oppose this bill in its current form. No other state has enacted legislation of this type. The insurance industry can address the problem by drafting a clear and unambiguous contractual pollution exclusion. I am therefore vetoing House Enrolled Act 1583.

H.R. Enrolled Act 1583, 109th Gen. Assem., 1997 Sess. (Ind. 1997) (Governor O'Bannon's veto

dollars available to clean up the environment. It means that virtually any CGL policy applies to pay an environmental liability or property damage claim. Pollution exclusions at most apply only to limit claims under pre-1985 policies where the damage was expected or intended.<sup>36</sup>

Shortly after *Kiger*, the supreme court decided *Seymour Manufacturing Co. v. Commercial Union Insurance Co.*<sup>37</sup> *Seymour* addressed the insurer's duty to defend its policyholder against environmental claims. CGL policies contain two promises. The first is to defend the policyholder against any suit; the second is to indemnify the policyholder for amounts it must pay to resolve a claim. The policyholder in *Seymour* was the entity that had run the now-infamous solvent recycling facility in Seymour, Indiana that became the Seymour Superfund Site. The insurer presented evidence that the policyholder had

stored multiple barrels of liquid waste at its facility, did not identify or otherwise label the barrels in order to assure the proper method of disposal, did not make any attempt to separate wastes from other incompatible wastes, permitted barrels to rust or otherwise deteriorate, did not clean up open and obvious spills, did not properly cover many barrels, and received some types of waste for which it had no treatment facility.<sup>38</sup>

Despite this evidence, which ultimately could have supported an expected or intended coverage defense, as well as other defenses not connected to this evidence, the supreme court held that the insurer had a duty to defend its policyholder against the federal government's environmental claims as a matter of law.<sup>39</sup> The court entered summary judgment on defense costs in favor of the policyholder. The court centered its decision on the ambiguity identified in *Kiger* and the well established principle that "the duty to defend is broader than the duty to indemnify."<sup>40</sup>

The court of appeals struck down two additional key insurer defenses in

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message). An over-ride vote during the next legislative session did not succeed. A similar bill, Senate Bill 309, which attempted to codify a similarly broad application of the absolute pollution exclusion, was introduced and defeated in that session. *See also* *Great Lakes Chem. v. Int'l Surplus Lines Ins. Co.*, 638 N.E.2d 847 (Ind. Ct. App. 1994), *trans. withdrawn*. After having argument on this case the same day as *Kiger*, the supreme court withdrew its initial grant of transfer and reinstated a court of appeals decision rejecting application of pollution exclusions to product liability claims and holding excess insurers liable for defense costs. *See id.*

36. *See also* *Great Lakes Chem.*, 638 N.E.2d at 847, *trans. withdrawn*. After hearing argument on this case the same day as *Kiger*, the supreme court withdrew its initial grant of transfer and reinstated a court of appeals decision rejecting application of pollution exclusions to product liability claims and holding excess insurers liable for defense costs.

37. 665 N.E.2d 891 (Ind. 1996).

38. *Id.* at 893.

39. *Id.*

40. *Id.* at 892.



1997. In *Hartford Accident & Indemnity Co. v. Dana Corp.*,<sup>41</sup> it held that the “suits” insurers must defend under *Seymour* included all adversarial administrative proceedings as well as courthouse lawsuits. Insurers had insisted only courthouse proceedings are included in the term “suit,” which was not defined in their policies.<sup>42</sup> The court also ruled that the “damages” an insurer must pay under a CGL policy includes amounts paid by policyholders to comply with a cleanup order.<sup>43</sup> Insurers had argued that “damages” in their insuring clauses meant only “legal” damages contained in a money judgment. The court held both terms, “suit” and “damages” were ambiguous.<sup>44</sup>

*Dana I* also rejected insurers’ claims that “containment costs” were not damages, because those sums are not spent to “fix” anything.<sup>45</sup> Containment measures, to prevent further damage, are often key components of remedial actions, as they prevent further damage and allow the damaged environment to recover. The court, recognizing that “damages” should not be construed to encourage further environmental degradation in order to be covered by insurance, agreed: “The cost of containment as a remedial action taken to prevent further release of hazardous substances would be considered damages.”<sup>46</sup>

The court of appeals handed down two more major decisions in 1999. In the first, *Travelers Indemnity Co. v. Summit Corp.*,<sup>47</sup> the court found that “personal injury” coverage applied to environmental liabilities. “Personal injury” coverage is not the same thing as “bodily injury” coverage. It is a special coverage part insuring claims for certain specified wrongs, including “wrongful entry” and “invasion of the right of private occupancy.”<sup>48</sup> After examining dictionary definitions and the multitude of conflicting cases on this point around the country (a split in authority was important evidence of ambiguity), the court found that these provisions “must be construed to cover the environmental damages” included in the wide range of cleanups in that suit.<sup>49</sup>

*Employers Insurance of Wausau v. Recticel Foam Corp.*<sup>50</sup> affirmed an insurer’s duty to defend, but it is mainly noteworthy on procedural grounds. It affirmed denial of the insurer’s *forum non conveniens* motion and application of Indiana law to the sole cleanup site in Tennessee. *Forum non conveniens* is a doctrine that allows dismissal of litigation in favor of a more conventional forum. It is expressed in Indiana Trial Rule 4.4(C) and Indiana common law.<sup>51</sup> On the

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41. 690 N.E.2d 285 (Ind. Ct. App. 1997) (“Dana I”).

42. *Id.* at 294-97.

43. *Id.* at 297-98.

44. *Id.*

45. *Id.* at 298.

46. *Id.*

47. 715 N.E.2d 926 (Ind. App. 1999).

48. *Id.*

49. *Id.* at 938. *Summit* also affirmed the ambiguity of both pollution exclusions and of “suit” and “damages.”

50. 716 N.E.2d 1015 (Ind. App. 1990).

51. *McCracken v. Eli Lilly & Co.*, 494 N.E.2d 1289 (Ind. Ct. App. 1989).



*forum non conveniens* issue, *Recticel* ruled that great weight is given to a policyholder-plaintiff's choice of forum which is to be disturbed only to avoid "substantial injustice."<sup>52</sup> That case recognized the modern reality of litigation between multi-state parties, that it will necessarily involve movement of witnesses and evidence across state lines.<sup>53</sup>

*Recticel*'s choice of law holding must be read together with similar affirmation of the application of Indiana law in *Dana I* and *Summit*.<sup>54</sup> All three decisions assess the factors set forth in section 188 (contracts) and section 193 (insurance policies) of the Restatement (Second) of Conflicts of Laws.<sup>55</sup> Some factors, such as the place of domicile of the parties or where the insurance policies were countersigned, are entitled to little weight, since they are so various and insignificant in the acquisition of insurance policies from multiple insurers from all over the United States. Instead, the courts have placed emphasis on the significance of the Indiana connection to the cases—*Dana I* (more cleanup sites and Dana plants than any other state), *Summit* (more cleanup sites), and to *Recticel* (headquartered in Indiana and one plant here during a major portion of the coverage period). A substantial Indiana connection supports application of Indiana law.<sup>56</sup>

In *Allstate Insurance Co. v. Dana Corp.*,<sup>57</sup> the Indiana Supreme Court held that the "all sums" language which exists in the insuring clauses of most CGL policies allows a policyholder facing environmental liabilities to select which of the policies involved in a multi-year occurrence to use to respond to a loss. In the typical policy's insuring clause the insurer promises to pay "all sums" the policyholder becomes obligated to pay as damages on account of property damage or bodily injuries caused by an occurrence. Thus, when multiple insurance policies are triggered by contamination spanning several years—which is typical in cases involving gradual environmental contamination—the insurers are jointly and severally liable for the loss, subject only to policy limits.<sup>58</sup> This is an exceptionally important holding. Insurers used to insist they would pay only for damage the policyholder could prove occurred in their policy period, or only a "pro rata" share of the entire loss. If the policyholder was unable to find all possibly applicable policies, or had used up coverage on other claims, or had an insolvent insurer, or was self-insured, it would be stuck with less than a complete recovery. Under *Dana II*, insurers can no longer escape paying their full policy limits.

The Indiana Supreme Court also adopted an "injury in fact" approach to the

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52. 716 N.E.2d at 1021.

53. *Id.* at 1022-23. The trial court in *Dana I* reached a similar conclusion.

54. *Id.* at 1023-25; *Summit*, 715 N.E.2d at 930-33; *Dana I*, 690 N.E.2d at 291-94.

55. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 188, 193 (1971).

56. The *Recticel* court also instructed how a policyholder must prove defense costs and deferred application of an estoppel against coverage defenses for breach of duty to defend in favor an existing bad faith claim. 716 N.E.2d at 1027-29.

57. 759 N.E.2d 1049 (Ind. 2001) ("Dana II").

58. *Id.* at 1057-58.



“trigger” of policies by environmental contamination; if damage takes place in the policy period, coverage is triggered. If environmental damage spars a number of years, all the policies are available to apply to the loss.<sup>59</sup>

Finally, the *Dana II* court held that the “owned property” exclusion which exists in most liability policies does not bar coverage for environmental liability claims.<sup>60</sup> This exclusion was used by insurers to refuse all pay for on-site cleanups at policyholder plants. The supreme court held the exclusion simply did not apply to claims for cleanup liability on owned property resulting from property damage (which is not for the benefit of the policyholder, but is an imposition of a liability on the policyholder).<sup>61</sup>

In 2002 the Indiana Supreme Court spoke once more on the absolute pollution exclusion. In *Freidline v. Shelby Insurance Co.*,<sup>62</sup> the court summarily affirmed the holdings of *Kiger* and *Seymour* that the absolute pollution exclusion (here applied by an insurer against a carpet fume claim) was overbroad and unenforceable. The insurer had claimed the exclusion was enforceable because the definition of “pollutants” included the word “fumes,” but the court disagreed. The *Freidline* court overturned the lower court’s grant of a bad faith award to the policyholder for the insurer’s continued use of the exclusion after *Kiger*, noting the relatively recent litigation over the conclusion.<sup>63</sup> The next insurer to rely on that exclusion may not be so fortunate.

All of this appellate work has been mirrored in the trial courts. A host of Indiana trial courts have applied these principles to a wide range of claims and costs. Numerous summary judgments have been issued in policyholder’s favor on the duty to indemnify<sup>64</sup> or the duty to defend<sup>65</sup> their policyholder with respect

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59. *Id.* at 1060.

60. *Id.* at 1056.

61. *Id.* (applying the reasoning of *Patz v. St. Paul Fire & Marine Ins. Co.*, 15 F.3d 699, 705 (7th Cir. 1994)).

62. 774 N.E.2d 37 (Ind. 1002).

63. As noted above, insurers in Indiana may be held liable for the tort of bad faith claims handling under *Erie Insurance Co. v. Hickman*, 622 N.E.2d 515, 518 (Ind. 1993), and the court of appeals, citing *Kiger*’s clear precedent on the exclusion, had imposed such an award.

64. See, e.g., *Muncie Sanitary Dist. v. Harleysville Ins. Co.*, No. IP-94-1401-C-D/F (S.D. Ind. Jan. 7, 1999); *Governmental Interinsurance Exch. v. City of Angola*, 8 F. Supp. 2d 1120 (N.D. Ind. 1998); *CGB Enter., Inc. v. Old Republic Ins. Co.*, No. 65D01-0002-CP-00014 (Posey County Cir. Ct. May 15, 2002); *EMI Co. v. Royal Ins. Co. of Am.*, No. 49D06-9811-CP-1550 (Marion County Super. Ct. Aug. 22, 2000), *vacated by agreement*; *Gen. Housewares Corp. v. CNA Ins. Co.*, No. 49D06-9706-CP-920 (Marion County Super. Ct. Jan. 6, 2000); *Henschen Oil, Inc. v. Burris Equip. Co., Inc.*, No. 20C01-9805-CT-036 (Elkhart County Cir. Ct. June 15, 2000); *Contractors United, Inc. v. Commercial Union Ins. Co.*, No. 49C01-9406-CP-2003 (Marion County Cir. Ct. Oct. 27, 1999); *Crown Int’l, Inc. v. Great N. Ins. Co.*, No. 49D12-9704-CP-522 (Marion County Super. Ct. March 13, 1998).

65. See, e.g., *Muncie Sanitary Dist.*, No. IP-94-1401-C-D/F; *City of Angola*, 8 F. Supp. 2d 1120; *Lear Corp. Auto. Sys., Inc. v. Allianz Underwriters Ins. Co.*, No. 49D10-9805-CP-0729 (Marion County Super. Ct. Dec. 22, 2002); *Heritage Envtl. Servs., LLC v. Sentry Ins.*, No.

to environmental claims.

Against this backdrop, the Indiana Court of Appeals examined five key issues in *PSI Energy, Inc. v. The Home Insurance Co.*<sup>66</sup> The *PSI* action arose from PSI's claims of substantial cleanup costs at the PSI's former manufactured gas plant ("MGP") sites.

1. *Lost Policies*.—Several of the insurers argued that because PSI had been unable to produce complete copies of their policies, PSI could not meet its burden of proving that coverage existed for its claims.<sup>67</sup> The trial court had agreed with the insurers. But the court of appeals reversed, holding that PSI did not have to produce policy language verbatim, but only the substance of the policies. The *PSI* court held that PSI could present the broad range of secondary evidence it had assembled to prove the policies, including its history of premium payments, employee testimony, and expert testimony concerning the likely terms in such form policies.<sup>68</sup> The court concluded that expert testimony, even where the expert could not testify with absolute certainty as to the likely terms in the lost policies, is admissible, when supported by the kind of other evidence that PSI had presented.<sup>69</sup>

2. *Expected or Intended Damage*.—The *PSI* court held that the concept of "fortuity," meaning that the damage giving rise to a liability cannot be expected or intended by the policyholders, is inherent in all CGL policies.<sup>70</sup> However, a policyholder can prove this point based on a subjective, rather than objective, basis.<sup>71</sup> The use of a subjective standard means that mere negligence or even recklessness on the part of the policyholder will not prove that the resulting damage was expected or intended and that such intent is based on what the policyholder actually believed.

3. *Trigger*.—The *PSI* court followed *Dana II* and held that where damage occurs over a multi-year period, each policy within that period is triggered and obligated to pay "all sums."<sup>72</sup> This is so even where, as with PSI's earlier policies, the policy requires that the "occurrence" "commence during the policy period."<sup>73</sup> The court saw no difference between this language and the language in *Dana II* requiring that an "'occurrence' take place during the policy period."<sup>74</sup> In a few later policies which define "occurrence" as "one happening," a "series of happenings," or "one event," the court held that PSI must show an event

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49F12-0112-CP-004803 (Marion County Super. Ct. Dec. 18, 2002); *CGB Enter.*, No. 65D01-0002-CP-00014; *Contractors United*, No. 49C01-9406-CP-2003.

66. 801 N.E.2d 705 (Ind. Ct. App. 2000).

67. *Id.* at 717.

68. *Id.* at 717-22.

69. *Id.*

70. *Id.* at 722-24.

71. *Id.* at 727-30.

72. *Id.* at 732-33.

73. *Id.* at 733-34.

74. *Id.*



causing damage during the policy period.<sup>75</sup>

4. *Notice*.—The insurers also argued that some of PSI's claims should be denied because of alleged "late notice." The insurers argued that PSI should have provided notice as soon as it became aware of any potential liability. The *PSI* court held that "the duty to notify an insurance company of potential liability is a condition precedent to the company's liability to its insured" and that "noncompliance with notice of claim provisions, which results in an unreasonable delay, triggers a presumption of prejudice to the insurer's ability to prepare an adequate defense."<sup>76</sup> However, the court also found that environmental liability cases are unique in that they require "lengthy site investigation and expert opinion" to determine exactly when the covered occurrence actually took place, unlike the automobile and personal injury cases upon which the insurers had based their argument.<sup>77</sup> This information, the court ruled, was "essential to PSI's determination of which insurers were potentially liable under the numerous policies it had purchased between 1950 and 1985."<sup>78</sup> Thus, the court concluded that there were issues of fact concerning the timeliness of PSI's notice. Moreover, because the insurers had not alleged any specific prejudice there also was an issue as to whether the insurers were actually prejudiced by the timing of the notice.

5. *Justiciability*.—Are the insurance questions ripe for review? The issue was raised by an excess insurer whose policies it claimed incepted well above the current cost of the cleanup. The *PSI* court held that under Indiana's Declaratory Judgment Act, PSI had the right to proceed against this excess insurer for a declaration as to the parties' rights and obligations under even high-level excess policies because, while current costs had not yet reached the level of those policies, site investigations were still on-going and the state environmental agency had not determined what level of cleanup would be required.<sup>79</sup>

The fact the policyholders can prove the contents of lost policies by secondary evidence and expert testimony about likely form provisions is of critical importance, since many policyholders are unable to retrieve policies they purchased many years ago, and insurers do not retain copies. The clarification that a subjective standard applies also is very important, and is consistent with the norm that even unwise or grossly negligent acts are covered.

Insurance funds, obtained through the cases cited above, are literally reshaping Indiana. Sites can be cleaned up without destroying companies. Abandoned polluted sites in our cities can be addressed. The risk of unanticipated social costs are now spread across a much wider body of assets, which now includes the entities which collected premiums to provide just this protection.

The full scope of our investment in cleaning the environment remains

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75. *Id.* at 735-36.

76. *Id.* at 715-16.

77. *Id.* at 716-17.

78. *Id.* at 717.

79. *Id.* at 713-15.

unclear. In the past year, Indiana courts turned attention to the air and to wetlands. In each case, challenging issues remain unsettled.

## II. NEW SOURCE REVIEW LITIGATION IN INDIANA

Clean Air Act ("CAA") enforcement lawsuits continue to hold center stage in Indiana's environmental law arena. Until recently, two lawsuits brought by the federal government against Indiana utilities were pending in the U.S. District Court for the Southern District of Indiana. *United States v. Southern Indiana Gas & Electric Co. ("SIGECO")*,<sup>80</sup> which settled by Consent Decree on June 6, 2003, spawned six important decisions on aspects of this highly controversial and hotly litigated federal enforcement initiative. *United States v. PSI Energy, Inc.* still pends.<sup>81</sup>

### A. The Federal Regulatory Framework

*SIGECO* and *PSI* are part of a federal initiative aimed at enforcing the New Source Review ("NSR") and Prevention of Significant Deterioration ("PSD") provisions of the CAA. The initiative targets principally midwestern coal-burning utilities. The CAA Amendments of 1970 required the U.S. Environmental Protection Agency ("USEPA") to establish National Ambient Air Quality Standards ("NAAQS") for listed pollutants that are found in ambient air as a result of stationary or mobile sources and that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare."<sup>82</sup> So far, USEPA has identified six such pollutants, referred to as "criteria" pollutants: sulfur dioxide, particulate matter, carbon monoxide, ozone, nitrogen dioxide, and lead.<sup>83</sup> The 1977 Amendments to the CAA established the NSR/PSD program.<sup>84</sup> The program aims to spur achievement of the NAAQS in non-attainment areas and to prevent significant deterioration in attainment areas.<sup>85</sup> The program applies to new major stationary sources and major modifications to existing major sources.<sup>86</sup> The NSR/PSD program only applies to the criteria pollutants.<sup>87</sup>

A modification triggers PSD/NSR review if the modified source is a major source and if the net emission increase is significant.<sup>88</sup> Modification to a minor source triggers the program if the modification itself would constitute a major stationary source.<sup>89</sup> A physical change in or change in the method of operation

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80. *United States v. S. Ind. Gas & Elec. Co.*, No. IP99-1692-C-M/F.

81. No. IP99-1693-C-M/S.

82. 42 U.S.C. § 7408(a)(ii)(A) (1998).

83. 40 C.F.R. §§ 50.4-50.12 (2003).

84. 42 U.S.C. §§ 7501-7515; 7470-7492.

85. *Id.*

86. *Id.*

87. *Id.*

88. 40 C.F.R. § 52.21(a)(2) (2003).

89. *Id.*



of a stationary source triggers PSD/NSR review if there is a significant net increase in emissions.<sup>90</sup> The regulations do not define what constitutes a physical change or change in the method of operation. They do, however, exclude certain categories of activities that are not a physical or operational change. These include modifications that constitute "routine maintenance, repair or replacement" ("RMRR").<sup>91</sup>

PSD permits require that Best Available Control Technology ("BACT") be installed.<sup>92</sup> The analysis that must be performed requires extensive and frequently expensive testing and analysis. The PSD permit application generally requires a BACT demonstration that follows USEPA's "top-down" BACT approach. A demonstration is required if installation of the most effective available control technology is not feasible for a particular project. Energy, economic or environmental reasons may be considered. New or modified sources in non-attainment areas require that lowest achievable emissions rate ("LAER") technology be installed.<sup>93</sup> A LAER determination generally may not consider energy, economic or environmental reasons for non-availability. Emission offset requirements also are imposed in non-attainment areas. Both BACT and LAER determinations are reviewed on a case by case basis. EPA issued "guidance" in 1998 that articulated EPA's position that the BACT/LAER determination is made as of the time of application rather than the time when the modifications at issue were performed.

USEPA proposed new NSR rules on July 23, 1996. Numerous drafts and records of comments followed. USEPA published the new NSR regulations on December 31, 2002. The new rules became effective on March 3, 2003. The new rules aim to streamline the NSR program which generally is acknowledged to be unwieldy and overly complex. The new rules only apply to modifications at existing sources.

One of the most significant aspects of the new rules is their modification of the options available for calculation of whether a project will result in significantly increased emissions. For NSR to apply under the new regulations, major sources must undergo a major modification.<sup>94</sup> "[A] project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases—a significant emissions increase . . . and a significant net emissions increase . . . ." <sup>95</sup> There are four ways to determine whether a "significant emissions increase" has occurred for modified units: (1) the actual-to-projected-actual test, (2) the actual-to-potential test, (3) the Clean Units Test, and (4) the hybrid test.<sup>96</sup>

The new rules allow the owner of a facility to establish an emissions cap,

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90. *Id.*

91. *Id.* § 52.21(b)(2)(iii)(a).

92. 42 U.S.C. § 7475 (1977).

93. 42 U.S.C. § 7503 (1990).

94. 40 C.F.R. § 52.21(a)(2)(ii).

95. *Id.* § 52.21(a)(iv)(a).

96. *See id.* §§ 52.21(a)(iv)(b)-(f), (b)(41)(ii)(d).

called a Plantwide Applicability Limit ("PAL").<sup>97</sup> Once the PAL is established, new or modified units within the facility trigger NSR only if the facility's actual emissions exceed the PAL.<sup>98</sup> The new rules establish a clean unit designation for units that have installed technology that is equivalent to BACT or LAER.<sup>99</sup> Modification to these clean units does not require approval for a period of ten years unless a permit condition must be changed.<sup>100</sup> The new rules also exempt from NSR certain types of pollution control projects that are presumed to be beneficial to the environment.<sup>101</sup>

USEPA also published a RMRR rule that became effective on December 31, 2002.<sup>102</sup> Under the new rule, a project is RMRR if it meets three criteria: (1) the replacement component must be identical to or must serve the same purpose of the replaced component; (2) the fixed capital cost of the new component plus certain ancillary costs must not exceed twenty percent of the current replacement value of the replaced component; and (3) the replaced component must not alter the basic design parameters of the replaced unit or cause the replaced unit to exceed any enforceable emission or operational limitation.<sup>103</sup>

These new rules have been challenged in court and their effectiveness is stayed until the challenges are complete. While EPA asserts that the new rules do not apply to the existing litigations, if they did virtually all of EPA's claims would have to be withdrawn.

### *B. The SIGECO Case*

Judge McKinney issued six published opinions in *SIGECO*.<sup>104</sup> In his July 18, 2002 decision, Judge McKinney examined the issue of whether a showing that there was no actual emission increase after a project is completed exempts the project from the PSD preconstruction requirement and denied SIGECO's motion for summary judgment on this defense. The government argued that it would encourage a wait and see approach by regulated sources if pre-construction review could be avoided by construction that does not result in an actual emissions increase.<sup>105</sup> Relying on the Environmental Appeals Board's decision in *In re Tennessee Valley Authority*,<sup>106</sup> Judge McKinney concluded that Congress intended NSR to require a pre-construction rather than a post-construction review

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97. 40 C.F.R. § 52.166 (1998); 40 C.F.R. § 52.21 (2003).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. 40 C.F.R. § 51.165 (2002).

103. *Id.*

104. *United States v. S. Ind. Gas & Elec. Co.*, No. IP99-1692-C-M/F, 2002 WL 1629817 (S.D. Ind. July 18, 2002).

105. *Id.* at \*2.

106. No. OAA-2000-04-008, 2000 WL 1358648 (E.A.B. Sept. 15, 2000).



process.<sup>107</sup>

In a July 26, 2002 decision, Judge McKinney examined SIGECO's claim that some of the government's claims for civil penalties are barred by the applicable statute of limitations.<sup>108</sup> The statute is 28 U.S.C.A. § 2462: "Except as otherwise provided by an Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . ."<sup>109</sup> The court entered summary judgment in favor of SIGECO on this issue. Judge McKinney adopted the majority position across the country by holding that an alleged failure to obtain a CAA pre-construction permit is a one-time violation that does not continue through time. The court noted that the government had alleged violations of the Clean Air Act's "preconstruction permit requirements contained in 42 U.S.C. § 7475 rather than a violation of the Act's operating permit requirements as set forth in 42 U.S.C. § 7661."<sup>110</sup> Judge McKinney held that a PSD violation "occurs when construction is commenced, but does not continue on past the date when construction is completed."<sup>111</sup>

In another July 26, 2002 decision, Judge McKinney considered whether the Indiana Department of Environmental Management's ("IDEM") determination that a particular project did not trigger PSD permit requirements affected the federal government's ability to allege that the project did trigger PSD.<sup>112</sup> SIGECO had approached IDEM regarding the project and had made a formal written request for a determination that the project was exempt pursuant to the RMRR exception. Shortly after the project was completed, IDEM formally determined that the project did not trigger PSD; a determination that has not been withdrawn. Judge McKinney determined, however, that IDEM's determination did not bind the federal government.<sup>113</sup> The court reasoned that the plain language of Section 7413 indicates that the federal government's claim against SIGECO was not precluded by IDEM's determination.<sup>114</sup> The court noted, however, that "equitable considerations may play an important part in the consideration of any remedy."<sup>115</sup>

In an October 24, 2002 decision, Judge McKinney examined the issue of whether the government's claims were barred by the Congressional Review of Agency Rule Making Act ("CRA")<sup>116</sup> by establishing a new agency rule without submitting a report to Congress about the rule.<sup>117</sup> SIGECO designated testimony

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107. *Id.* at \*3.

108. *SIGECO*, 2002 WL 1760725 (S.D. Ind. July 26, 2002).

109. 28 U.S.C.A. § 2462 (West 2004).

110. *SIGECO*, 2002 WL 1760725, at \*5.

111. *Id.*

112. *SIGECO*, 2002 WL 1760699 (S.D. Ind. July 26, 2002).

113. *Id.* at \*6.

114. *Id.* at \*4.

115. *Id.*

116. 5 U.S.C. § 801 (West 2004).

117. *SIGECO*, 2002 WL 31427523 (S.D. Ind. Oct. 24, 2002).

by former government officials and consultants to support its position that the USEPA in its late 1990's "enforcement initiative" that culminated in these NSR lawsuits had changed its policy regarding application of the NSR rules, in particular the RMRR exception, to utility sources.<sup>118</sup> Initially, the court disagreed with two other federal district court decisions by finding that the judicial review provisions of the CRA or the CAA did not bar SIGECO's motion for summary judgment on this issue. The court proceeded, however, to exclude the expert testimony that SIGECO had presented.<sup>119</sup> The court relied, instead on the language of the statute and rules and on the Seventh Circuit's decision in *Wisconsin Electric Power Co. v. Reilly* ("WEPCO") and USEPA guidance prior to WEPCO.<sup>120</sup> In WEPCO the Seventh Circuit applied a fact-intensive test to determine whether the RMRR exception applied to each project at issue. The decision was preceded by an EPA memorandum by Don Clay (the "Clay Memorandum") that detailed USEPA's approach. Judge McKinney ruled, based on these considerations and the evidence presented, that USEPA's actions did not constitute a new rule subject to review under the CRA.<sup>121</sup>

In a February 13, 2003 decision, Judge McKinney examined the issues of whether the USEPA's interpretation of the RMRR exception was reasonable and whether SIGECO had fair notice of this interpretation.<sup>122</sup> USEPA argued that the frequency factor in its analysis of whether a project is subject to the RMRR should be determined by looking at the history of the unit at issue.<sup>123</sup> SIGECO argued for an industry-wide analysis regarding the frequency of the particular type of project at issue. The court held that the EPA's interpretation was reasonable and would receive deference.<sup>124</sup> Judge McKinney also held that the RMRR exemption was sufficiently ambiguous to require fair notice to the regulated public of how the regulation would be interpreted.<sup>125</sup> The court held that the regulation itself was ambiguous, but that the 1988 memorandum by USEPA official Don Clay regarding projects that were later adjudicated in the WEPCO case, followed by the Seventh Circuit's WEPCO decision, gave the utility industry notice of USEPA's position on application of the RMRR exception. The court examined whether IDEM's 1998 determination that one of the projects at issue did not trigger PSD constituted contrary notice. Judge McKinney concluded that SIGECO could not rely on the 1998 determination as notice because it was issued after construction of the project at issue was completed.<sup>126</sup>

In a February 18, 2003 decision, Judge McKinney held that certain of

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118. *Id.* at \*1.

119. *Id.* at \*7.

120. 893 F.2d 901 (7th Cir. 1990).

121. *SIGECO*, 2002 WL 31427523, at \*8.

122. *SIGECO*, 245 F. Supp. 2d 994 (S.D. Ind. 2003).

123. *Id.* at 1008.

124. *Id.* at 1010.

125. *Id.* at 1011.

126. *Id.* at 1023.



SIGECO's related defenses had become moot due to the court's various rulings in the case.<sup>127</sup> On SIGECO's equitable defense of laches, the court held that SIGECO was not prejudiced by any delay on the part of the government.<sup>128</sup> On SIGECO's claim of waiver, the court held that SIGECO had not demonstrated that the government had intended to relinquish its right to pursue its CAA claims.<sup>129</sup> The court also granted summary judgment to the government regarding SIGECO's remaining defenses that pertain to the alleged new regulatory interpretation by USEPA, including violation of the Administrative Procedures Act, ultra vires administrative action, retroactive rulemaking, violation of the Federal Register Act, substantive due process, and arbitrary and capricious administrative action.<sup>130</sup> The court again noted, however, that evidence such as IDEM's determination that SIGECO's 1997 project did not trigger PSD would bear on any penalty imposed on SIGECO.<sup>131</sup>

In an April 11, 2003 decision, Judge McKinney ruled that a census commissioned by several utilities, including SIGECO, and governmental entities was not admissible as an objective study of maintenance practices throughout the utility industry.<sup>132</sup> The court reasoned that the census was not reliable because the census takers and respondents knew that the questionnaire was circulated for purposes of developing a defense in *SIGECO* and related cases, and because the census sought information about activities that might have taken place up to sixty years ago.<sup>133</sup>

On June 6, 2003, the U.S. Department of Justice ("DOJ") announced its settlement with SIGECO. The settlement required SIGECO to install technology to reduce particulate matter emissions and continuous operation of a control device to remove nitrogen oxide emissions. By 2006, SIGECO will upgrade its oldest unit by repowering it with natural gas, installing state of the art emission controls, or permanently retiring the unit. These measures are expected to cost approximately \$30 million. SIGECO will pay a civil penalty of \$600,000 and will spend at least \$2.5 million to install and operate technology to reduce emissions of sulfuric acid from SIGECO's Culley plant in Newburgh, Indiana.<sup>134</sup>

### *C. Other Recent U.S. District Court Decisions on NSR/PSD Enforcement*

*United States v. Duke Energy Corp.*<sup>135</sup> and *United States v. Ohio Edison*

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127. 2003 WL 446280, at \*2 (S.D. Ind. Feb. 18, 2003).

128. *Id.* at \*4.

129. *Id.*

130. *Id.* at \*5.

131. *Id.* at \*5-6.

132. *United States v. U.S. Ind. Gas & Elec. Co.*, 258 F. Supp. 2d 884 (S.D. Ind. 2003).

133. *Id.* at 895.

134. Southern Indiana Gas and Electric Company (SIGECO) F.B. Culley Plant Clean Air Act Settlement (June 6, 2003), at <http://www.epa.gov/compliance/resources/cases/civil/caa/sigecofb.html>.

135. 278 F. Supp. 2d 619 (M.D.N.C. 2003).

Co.<sup>136</sup> contain rulings that both complement and conflict with the *SIGECO* rulings. Contrary to *SIGECO*, *Duke Energy* holds that the test for determining whether a modification was routine maintenance, repair, or replacement was whether the modification was routine in the industry rather than at a particular generating unit.<sup>137</sup> *Duke Energy* also holds, contrary to *SIGECO*, that a utility's failure to obtain a pre-construction permit before making the modification was a continuing violation for statute of limitations purposes.<sup>138</sup> *Ohio Edison* held that the plain language of the CAA, read together with the routine maintenance exemption, put the industry on notice that the exemption would be narrowly construed by government.<sup>139</sup> Judge McKinney reached a different conclusion on the character of the regulation, but the same result in *SIGECO*.

The diversity of district court rulings, on top of the tremendous complexity of the underlying facts, makes it difficult to predict how appellate courts will resolve the governing issues. This is particularly true given government ambivalence in the form of new regulations that remove many of the projects at issue from the reach of the NSR/PSD program. The uncertainty imposed on utilities and other industries by these divergent rulings underscores the appeal of fair and consistent forward-looking regulation by clearly worded statutes and rules rather than retroactive litigation that in many cases involves projects completed decades ago, in some cases by entirely different entities than the present target of NSR/PSD enforcement.

A decision from the Western District of New York highlights the implications of such ownership changes. In *New York v. Niagara Mohawk Power Corp.*,<sup>140</sup> the court granted the defendants' motion to dismiss because those defendants neither owned nor operated the facilities at issue at the time the modifications that allegedly violated PSD took place. The court examined the pre-construction requirements of the federal PSD program and determined that "[p]reconstruction obligations are imposed only upon the person who actually seeks to construct or modify a facility within the meaning of the Act."<sup>141</sup> The court stated that:

It is simply counterintuitive to construe the Clean Air Act in such way as to impose liability for failure to follow the Act's pre-construction requirements on a person for whom compliance would have been impossible. The State cites no cases standing for this proposition, and this Court has been unable to find any.<sup>142</sup>

The court concluded that even if the facilities were unlawfully modified, third-party after-the-fact purchasers were not liable for the pre-construction violations.

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136. 276 F. Supp. 2d, 829 (S.D. Ohio 2003).

137. *Duke Energy*, 278 F. Supp. 2d at 638.

138. *Id.* at 652.

139. *Ohio Edison*, 276 F. Supp. 2d at 888.

140. 263 F. Supp. 2d 650 (W.D.N.Y. 2003).

141. *Id.* at 668-69.

142. *Id.* at 669.



*D. The Eleventh Circuit's TVA Decision*

The Eleventh Circuit Court of Appeals recently evaluated and set aside an administrative decision critical to the DOJ's NSR enforcement initiative against utilities.<sup>143</sup> As part of its NSR enforcement initiative against utilities, USEPA issued an administrative compliance order ("ACO") to the Tennessee Valley Authority ("TVA") requiring the TVA to undertake costly and burdensome compliance initiatives. USEPA delegated the task of evaluating TVA's legal challenge of the ACO to USEPA's Environmental Appeals Board ("EAB"). The EAB issued an order (the "EAB order") concluding that the projects undertaken by the TVA had violated NSR, as USEPA had alleged.<sup>144</sup>

In federal court, the TVA challenged the EAB order as unlawful and the product of arbitrary and capricious decision-making pursuant to the federal Administrative Procedure Act ("APA").<sup>145</sup> The Eleventh Circuit held that it lacked jurisdiction to review the EAB Order because the ACO was not a "final" agency action.<sup>146</sup> The court determined that USEPA "must prove the existence of a CAA violation in district court; until then, TVA is free to ignore the ACO without risking the imposition of penalties for noncompliance with its terms."<sup>147</sup> Central to the Eleventh Circuit's ruling was its conclusion that the statutory scheme that resulted in issuance of the ACO is "unconstitutional to the extent that severe civil and criminal penalties can be imposed for non-compliance with the terms of an ACO."<sup>148</sup>

The Eleventh Circuit first discussed USEPA's enforcement options when it found that a regulated party had engaged in unlawful activity. The USEPA can: (1) request that the Attorney General commence a criminal prosecution under 42 U.S.C. § 7413(a)(3); (2) file suit in federal court and seek injunction relief and civil penalties under 42 U.S.C. § 7413(a)(1)(C) or (a)(3)(C); (3) after a final adjudication consistent with the APA and 40 C.F.R. § 22, assess civil penalties pursuant to 42 U.S.C. § 7413(d); or (4) issue an ACO directing the regulated party to comply with various requirements pursuant to 42 U.S.C. § 7413(a)(1)(A), (a)(2)(A), (a)(3)(B) or (a)(4).<sup>149</sup> Under 42 U.S.C. § 7413(a)(1)(4), an ACO must meet three conditions: (1) it must be based upon "any information available to the Administrator"; (2) it must be issued within thirty days after the issuance of a Notice of Violation; and (3) the regulated party must be given an "opportunity to confer" with the USEPA.<sup>150</sup> The court noted that "[t]he problem with ACOs stems from their injunction-like status coupled with the fact that they are issued without an adjudication or meaningful judicial

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143. *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236 (11th Cir. 2003).

144. *Id.* at 1239.

145. *Id.*

146. *Id.*

147. *Id.* at 1239-40.

148. *Id.* at 1239.

149. *Id.* at 1241.

150. *Id.*

review."<sup>151</sup>

The court then reviewed the USEPA's case against the TVA. The court noted that between 1982 and 1996, TVA implemented projects involving replacement of various boiler components at its coal-fired plants.<sup>152</sup> In 1999, the USEPA concluded that the projects did not constitute "routine maintenance" activities, and hence the projects triggered NSR requirements.<sup>153</sup> On November 3, 1999 the USEPA issued its first ACO to the TVA.<sup>154</sup> The ACO required the TVA to identify modifications undertaken without NSR permits, to apply for the permits, and to enter into a compliance agreement with the USEPA.<sup>155</sup> Negotiations took place that led to six amendments to the ACO.<sup>156</sup> TVA held to its position that its projects did not trigger NSR. The USEPA then attempted to adjudicate the issue of whether TVA had violated the CAA by asking the EAB to reconsider the sixth ACO.<sup>157</sup> The EAB "crafted a reconsideration procedure which, to say the least, lacked the virtues of most agency adjudication."<sup>158</sup> The ALJ was instructed by the EAB not to make findings of fact and conclusions of law.<sup>159</sup> The EAB acted both as adjudicator and as USEPA's delegatee.<sup>160</sup> The TVA was not entitled to full discovery.<sup>161</sup> Testimony at the hearing was limited at USEPA's request. The proceeding was rushed, limiting the time for TVA to prepare its defense. USEPA and the EAB "manufactured the procedures they employed on the fly, entirely ignoring the concept of the rule of law."<sup>162</sup> Ultimately, the EAB affirmed most of the sixth amended ACO.<sup>163</sup>

The next part of *TVA v. Whitman* reviewed the "finality doctrine." Citing *FTC v. Standard Oil of California*,<sup>164</sup> the court identified five factors for determining finality:

- (1) whether the agency action constitutes the agency's definitive position;
- (2) whether the action has the status of law or affects the legal rights and obligations of the parties;
- (3) whether the action will have an immediate impact on the daily operations of the regulated party;
- (4) whether pure questions of law are involved; and
- (5) whether pre-

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151. *Id.*

152. *Id.* at 1244.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 1245.

158. *Id.*

159. *Id.* at 1246.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. 449 U.S. 232, 239-43 (1980).



enforcement review will be efficient.<sup>165</sup>

The court noted that Congress may not have intended ACOs to have the status of law.<sup>166</sup> The court noted that 42 U.S.C. § 7603 gives the USEPA emergency powers when a pollution source presents an imminent and substantial endangerment to public health, welfare, or the environment.<sup>167</sup> An order issued pursuant to this provision attains an injunction-like status only for an extremely short time period.<sup>168</sup> An order issued pursuant to section 7413, on the other hand, provides that the defendant must have an “opportunity to confer” with the USEPA.<sup>169</sup> The Eleventh Circuit concluded that Congress intended orders issued under section 7413 to be “complaint-like devices used to avoid litigation.”<sup>170</sup> The court further noted that judicial review of such orders is not available because ACOs are issued without a record.<sup>171</sup>

Based on this analysis, the Eleventh Circuit concluded that an ACO that has the status of law violates the Due Process Clause of the Fifth Amendment.<sup>172</sup> Under the CAA, the findings in an ACO can be based on “any information available.” If ignored, an ACO leads automatically to the imposition of severe civil penalties and possibly imprisonment. On appeal, the reviewing court could only review whether the ACO had been validly issued, i.e., whether the issuance of the ACO was based on “any information.”<sup>173</sup> There would be no judicial review of whether the conduct underlying issuance of the ACO actually took place and whether the alleged conduct was a CAA violation.<sup>174</sup> The Eleventh Circuit stated that the constitutional problem cannot be cured by USEPA’s submission to a voluntary adjudication prior to issuance of an ACO.<sup>175</sup> This would “delegate judicial power to a non-Article III tribunal.”<sup>176</sup> Hence, the Eleventh Circuit stated that “[t]he Clean Air Act is unconstitutional to the extent that mere noncompliance with the terms of an ACO can be the sole basis for the imposition of severe civil and criminal penalties.”<sup>177</sup> Because USEPA’s ACOs lacked the force of law, they did not constitute a final agency action subject to judicial review under the APA.<sup>178</sup>

The *Whitman* decision did far more than dismiss the TVA’s challenge to a series of ACOs alleging violations of NSR/PSD requirements. The Eleventh

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165. *Whitman*, 336 F.3d at 1248.

166. *Id.*

167. *Id.* at 1249.

168. *Id.*

169. 42 U.S.C. § 7413(a)(4) (West 2004).

170. *Whitman*, 336 F.3d at 1250.

171. *Id.* at 1251.

172. *Id.* at 1258.

173. *Id.*

174. *Id.*

175. *Id.* at 1259.

176. *Id.*

177. *Id.* at 1260.

178. *Id.*

Circuit's jurisdictional ruling had the effect of invalidating a pro-government decision frequently cited by government against utilities in NSR litigation. Several courts, including the Southern District of Indiana in *SIGECO*, had applied the now-invalidated EAB decision against utilities in NSR disputes. State and federal environmental agencies must evaluate the constitutionality of their enforcement mechanisms and approaches in light of the *Whitman* decision. The Eleventh Circuit's rejection of USEPA's willingness to make up procedures as it went along, to the detriment of a regulated entity, should guide federal and state agencies' efforts to identify and prosecute alleged PSD/NSR violations.

#### *E. PSD/NSR Enforcement by IDEM*

IDEM also has initiated enforcement actions that addressed alleged PSD/NSR violations. States may include PSD programs in their State Implementation Plans ("SIP").<sup>179</sup> If a state does not have an EPA-approved PSD program as part of its SIP, then it is delegated the authority to implement and enforce the federal program contained in 40 C.F.R. § 52.21. IDEM has been delegated the authority to implement the federal PSD program since September 30, 1980.<sup>180</sup> On March 3, 2003, the EPA published a conditional approval of Indiana's revised SIP which included Indiana's PSD program contained in title 326, rule 1.1 of the Indiana Administrative Code, making the SIP revision effective as of April 3, 2003.<sup>181</sup>

IDEM's NSR enforcements have been challenged. One challenge resulted in a trial court decision that invalidated IDEM's demand that a northern Indiana foundry apply for and obtain PSD permits for projects implemented in the mid-1980's by a prior owner.<sup>182</sup> IDEM's Order, dated February 17, 2003 ("2003 Order"), purported to require a foundry owned by Dalton Corporation ("Dalton") to seek pre-construction permits under the CAA's PSD rules for projects implemented in 1984-1985 by a prior owner of the foundry. IDEM's objective was to force Dalton to install emission control equipment that would meet the CAA's BACT standards. The 1984-1985 projects were implemented by the prior owner to make the foundry more economically viable and safer to operate. The projects included replacement of portions of the cupola charge handling system, the raising of the cupola shell stack height, and replacement of two molding lines by a single new molding line.

Dalton petitioned for administrative review but filed a declaratory judgment action in the Marion County Superior Court. IDEM sought to dismiss the court proceeding on the grounds that the dispute must first be adjudicated before the OEA under the "exhaustion of administrative remedies" doctrine. Dalton resisted, citing a recent Indiana Supreme Court decision, *Indiana Department of*

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179. 40 C.F.R. § 51.166.

180. See 68 FR 1970 (January 15, 2003) for a history of IDEM's PSD program.

181. IND. ADMIN. CODE tit. 326, r. 1.1 (2003).

182. *Dalton Corp. v. Ind. Dep't of Env'tl. Mgmt.*, No. 49D06-0307-PL-001204 (Marion Super. Ct. Nov. 20, 2003).



*Environmental Management v. Twin Eagle LLC*,<sup>183</sup> which held that exhaustion of administrative remedies was not required because the issues raised were issues of law.<sup>184</sup> The Marion County Superior Court rejected IDEM's exhaustion claim and held it could rule on the legality and enforceability of IDEM's February 17, 2003 order.<sup>185</sup>

In granting Dalton's motion for summary judgment, the Marion Superior Court cited six reasons why the 2003 order could not be enforced. First, the projects at issue, and the specific issue of whether the projects triggered PSD requirements, had been raised in a prior lawsuit that involved IDEM and the former owner that implemented the projects in 1984-1985.<sup>186</sup> In May 1986 a citizen group gave notice to IDEM of its intent to file a lawsuit against the prior owner and IDEM pursuant to the citizen suit provisions of the CAA. The citizen suit was filed in 1987 and resolved and dismissed with prejudice in March 1990 without action on the PSD issue. However, the determination of whether PSD requirements applied to the 1984-1985 projects was at issue, and in the three years the matter was pending could have been determined in that litigation. The Marion County Superior Court held that the claim preclusion branch of the doctrine of *res judicata* barred the 2003 order as a matter of law.<sup>187</sup>

The Marion County Superior Court also held that IDEM's order was barred by Indiana's statute of limitations for environmental enforcement actions.<sup>188</sup> Indiana statutes require that IDEM seek enforcement of environmental statutes and regulations within three years of the time that IDEM discovers a violation.<sup>189</sup> IDEM argued that its 2003 order was a "permitting" rather than an "enforcement" action, and thus was not subject to the three year limitation and also that Dalton's failure to obtain a PSD permit was a "continuing" violation. The Marion Superior Court rejected both of these arguments. It held that the substance of the action rather than IDEM's label determined the applicable statute of limitations.<sup>190</sup> Citing *SIGECO*,<sup>191</sup> the court also held that the violation of a PSD construction permit requirement does not continue past the completion date of construction.

The court's third reason that the February 17, 2003 order could not be enforced was that it was not directed to the entity that actually implemented the projects at issue.<sup>192</sup> The Marion County Superior Court cited the New York District Court decision, discussed above, that also concluded, based on statutory interpretation, that third party after-the-fact purchasers are not liable for alleged

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183. 798 N.E.2d 839 (Ind. 2003).

184. *Id.* at 844.

185. *Dalton Corp.*, slip. op. at 6.

186. *Id.* at 2-3.

187. *Id.*

188. *Id.* at 8.

189. IND. CODE § 13-14-6-2 (2003).

190. *Dalton Corp.*, slip op. at 10.

191. *Id.* (citing *SIGECO*, 2002 WL 1760699 (S.D. Ind. July 26, 2002)).

192. *Id.* at 11.

pre-construction violations under the CAA.<sup>193</sup>

The equitable doctrines of laches and estoppel also were held to bar the 2003 order. Laches applies when there is inexcusable delay in asserting a right, an implied waiver from knowing acquiescence in existing conditions and prejudice due to the delay.<sup>194</sup> Estoppel requires a representation or concealment of material facts, made by a party with knowledge of the facts to a party ignorant of the facts, and detrimental reliance by the receiving party.<sup>195</sup> The Marion County Court held that the elements of both doctrines were met based on the undisputed facts.<sup>196</sup>

The final reason why the 2003 Order could not be enforced is that the Order sought to force Dalton to perform an impossible task.<sup>197</sup> Dalton submitted expert testimony that detailed the unreliability of existing data and the impossibility of determining or even reliably estimating base emissions or the net emission change needed to determine whether or not the 1984-1985 projects triggered PSD requirements.<sup>198</sup> IDEM did not submit counter-evidence on this point. Citing an Indiana decision excusing compliance with a regulatory requirement made impossible by the death of the claimant, *Pedigo v. Miller*,<sup>199</sup> the court held that Dalton was excused from compliance with the February 17, 2003 order on impossibility grounds.<sup>200</sup>

#### *F. Future Indiana NSR/PSD Litigation*

Further heated debate and litigation over alleged PSD/NSR violations are a certainty at both the federal and state levels. Numerous cases pend at both appellate and state levels. Many fundamental issues remain unresolved. One such issue is whether the five-year limitations period that applies to federal PSD/NSR claims applies when the federal government seeks equitable relief as opposed to civil penalties. The majority position imposes the five-year limitations period to claims for civil penalties. The "continuing violation" theory does not rejuvenate the federal government's claims regarding projects that took place outside of the limitations period. However, equitable relief, in particular the imposition of modern BACT on old projects, has the potential to impose tremendous costs on defendant facilities. The federal government will argue that statutory limitations periods do not apply to the equitable claims. However, USEPA's and IDEM's stance that they may impose modern BACT on projects completed long ago is punitive or compensatory rather than equitable in nature. The fundamental policy reasons for barring stale claims, including the inevitable

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193. *Id.* (citing *New York v. Niagara Mohawk*, 263 F. Supp. 2d 650 (W.D.N.Y. 2003)).

194. *Bd. of Zoning Appeals v. Beta Tau Housing Corp.*, N.E.2d 780, 782 (Ind. Ct. App. 1986).

195. *Advisory Bd. of Zoning Appeals for the City of Hammond v. Found. for Comprehensive Mental Health Inc.*, 497 N.E.2d 1089, 1092 (Ind. Ct. App. 1986).

196. *Dalton Corp.*, slip op. at 12-13.

197. *Id.* at 14.

198. *Id.*

199. 369 N.E.2d 1100 (Ind. App. 1977).

200. *Dalton Corp.*, slip op. at 14.



loss of evidence needed to prove or disprove the claim, and in environmental cases the regulated public's substantial need for stability and predictability in the way government interprets and applies environmental laws, apply equally to NSR/PSD claims that seek equitable relief as opposed to civil penalties. The impact of USEPA's new regulations on pending NSR/PSD claims remains uncertain and likely will be explored by the litigants in pending and new NSR/PSD cases.

### III. OTHER DEVELOPMENTS IN INDIANA ENVIRONMENTAL LAW

#### A. Development Activities in Isolated Wetlands

A tempest of controversy regarding regulation of development activities in isolated wetlands followed the United States Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps. of Engineers*.<sup>201</sup> Moreover, Indiana developers are part of the fray.<sup>202</sup> *Twin Eagle* reversed and remanded the trial court's entry of summary judgment in favor of a developer as to whether or not the Indiana Department of Environmental Management ("IDEM") has statutory authority to regulate isolated wetlands.

Wetlands are regulated by the federal Clean Water Act ("CWA") which prohibits "the discharge of any pollutant" into "waters of the United States" without a permit.<sup>203</sup> Such permits are issued under the National Pollutant Discharge Elimination System ("NPDES"). Section 404 of the CWA provides for issuance of permits for dredge and fill activities in wetlands under a program ("Section 404 Program") administered by the U.S. Army Corps of Engineers. Although Indiana administers its own NPDES program, it has not sought permission to issue wetlands permits under the section 404 Program.

*SWANCC* held that "waters are 'waters of the United States' for purposes of the CWA only if they are either navigable or tributaries of or wetlands adjacent to navigable waters."<sup>204</sup> Isolated wetlands fall outside of this definition. Because *SWANCC* removed isolated wetlands from the reach of the section 404 Program, IDEM attempted to fill the regulatory gap by "stating its intention, until new rules were approved, to regulate" isolated wetlands "through an 'interim regulatory process' whereby it would apply its state NPDES permitting process to applications for permits for dredged and fill material."<sup>205</sup> This process was announced by press release, with no promulgation of a rule and with no articulation of any standards under which a permit would be issued. *Twin Eagle* sought and obtained a declaratory judgment to prevent IDEM from enforcing state environmental laws against a proposed project calling for fill activities in

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201. 531 U.S. 159 (2001) ("*SWANCC*").

202. See Ind. Dep't of Evtl. Mgmt. v. *Twin Eagle LLC*, 798 N.E.2d 839 (Ind. 2003).

203. 33 U.S.C. § 1342 (2003).

204. *Twin Eagle*, 798 N.E.2d at 842 (citing *SWANCC*, 531 U.S. at 171, 174).

205. *Id.*

certain isolated wetlands on Twin Eagle's land.<sup>206</sup>

The Indiana Supreme Court first evaluated IDEM's argument that Twin Eagle's claims could not be adjudicated in court because IDEM must first resolve whether the particular twenty-one acres of isolated wetlands involved are subject to regulation and because the developer had not exhausted its administrative remedies.<sup>207</sup> This issue is of crucial significance to members of the regulated community. If they must submit to unlawful regulatory commands in order to apply for or obtain permits, then go through an application process and an administrative appeal only to then obtain a court determination that the entire exercise was unlawful, it will substantially compromise a citizen's ability to resist unlawful government demands.

The court first affirmed that the Declaratory Judgments Act is to be given a liberal construction, and may address an issue only when the "ripening seeds of a controversy" are present.<sup>208</sup> It recognized the utility of prompt adjudication of a challenge to the validity of a regulatory process that, if it is found to be illegal, can and should be avoided altogether.<sup>209</sup>

The court also affirmed the exception to the exhaustion of administrative remedies for purely legal issues.<sup>210</sup> The capacity to make such a challenge is a crucial check on a government's over-zealous expansion of its power. Purely legal questions also do not require application of agency expertise or a developed administrative record and actually can save time and money both for citizens and agencies.<sup>211</sup>

The supreme court held, however, that IDEM has statutory authority to regulate isolated wetlands pursuant to laws enacted prior to the enactment of the federal CWA in 1972.<sup>212</sup> The court did not accept the developer's argument that IDEM's statutory authority to adopt rules necessary to implement the CWA<sup>213</sup> was a "jurisdictional confinement of the waters to be regulated to those subject to the CWA."<sup>214</sup> The court cited various statutes that give IDEM general authority to protect the environment and to prevent pollution.<sup>215</sup> None of these authorize the state to require an NPDES permit for an isolated non-federal wetland, but the court held that general authority was sufficient to support IDEM's actions.

The next question addressed was whether the isolated ponds at issue fit Indiana's statutory definition of "waters." The definition excluded "private ponds" from regulation. The supreme court agreed with Twin Eagle's argument

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206. *Id.*

207. *Id.* at 844.

208. *Id.* at 843.

209. *Id.* at 844.

210. *Id.*

211. *Id.*

212. *Id.* at 845.

213. IND. CODE § 13-18-3-2(a) (2003).

214. *Twin Eagle*, 798 N.E.2d at 846.

215. *Id.* (citing IND. CODE §§ 13-18-4-3, 13-18-3-1, 13-18-4-4).



that “private ponds” are bodies of water wholly on the property of one owner not connected with any public water.<sup>216</sup> The court held that the “private pond” and “wetland” determinations present fact issues that require administrative determination.<sup>217</sup> The court also noted that the term “wetlands” has no statutory definition, only a general regulatory definition under title 327, rule 6.1-2-62 of the Indiana Administrative Code, and that wetlands can “by their very nature vary in the amount of water they contain at a given time, and their boundaries can change depending on the season and the weather.”<sup>218</sup>

The court said this “somewhat unsatisfactorily legal framework” provided Twin Eagle with two options: apply for a permit and challenge any adverse determination, or if it “is sufficiently confident,” do the project and fight any enforcement activity.<sup>219</sup> The court implicitly acknowledged the ambiguity of the statutory definition without any rules that would clearly inform a citizen if it needed a permit, but stated it saw “no alternative” since a recent statute prohibited IDEM from making new wetland rules before a legislative study commission reported.<sup>220</sup>

Finally, the Indiana Supreme Court accepted IDEM’s position that it can regulate isolated wetlands pursuant to an “interim process” rather than regulations promulgated pursuant to the Administrative Orders and Procedures Act (“AOPA”).<sup>221</sup> The court concluded no rulemaking was needed because IDEM already had a rule requiring an NPDES permit for “[a]ny discharge of pollutants into waters of the state.”<sup>222</sup> The court ignored (1) that an NPDES permit is not a creation of state law; it is a federal permit issued as to the Federal Clean Water Act waters, and (2) that IDEM had announced it was intending to promulgate new rules for isolated wetlands. If IDEM did not actually need to promulgate a new rule to regulate isolated wetlands, why did it announce this prospect or call its own authority “interim?” The only way the court could leave IDEM with a capacity to save wetlands which IDEM claims were at risk was to find IDEM already had a sufficient rule in place.

*Twin Eagle* retains viability for its procedural holdings, but the legislature has sapped its substantive sway. The legislature overruled Governor O’Bannon’s veto and enacted a new structure to clarify what isolated wetlands are subject to IDEM permit requirements.<sup>223</sup> Wetlands are classified according to size, location, and ecological value, and only the most significant are required to seek IDEM permits. Private ponds (the vast majority of Twin Eagle’s wetlands) remain exempt from regulation.

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216. *Id.* at 846-47.

217. *Id.* at 847.

218. *Id.*

219. *Id.*

220. *Id.*

221. IND. CODE § 4-22-2 (2003).

222. *Twin Eagle*, 798 N.E.2d at 848.

223. H.E.A. 1798, 113th Gen. Assem., 1st Reg. Sess. (Ind. 2004).

*B. Standing in Administrative Proceedings*

Under the AOPA, a person who is "aggrieved or adversely affected" by an agency's action may seek administrative review.<sup>224</sup> The Indiana Court of Appeals reviewed and clarified this standard, in an environmental context, in *Huffman v. IDEM*.<sup>225</sup> The Indiana Supreme Court granted transfer, vacating the court of appeal's decision on November 19, 2003. The case involved a property owner's petition for administrative review of IDEM's decision to renew a National Pollutant Discharge Elimination System ("NPDES") issued pursuant to the CWA to Eli Lilly & Co. ("Lilly").

The property owner alleged she was "aggrieved or adversely affected" because she is a citizen of Indiana whose family owned an interest in property located contiguous to Lilly's facility.<sup>226</sup> Lilly moved to dismiss the property owner's petition under the judicial doctrine of standing, which requires a showing of direct injury. The OEA's dismissal of the petition on this ground was affirmed by the trial court.

The court of appeals had reversed these rulings. It held that the judicial doctrine of standing was not the proper formulation of the AOPA's "aggrieved or adversely affected" standard.<sup>227</sup> The court held that to meet the standard a person must show "a substantial grievance, a denial of some personal, pecuniary or property right or the imposition . . . of a burden or obligation."<sup>228</sup> The court based this ruling on legislative intent as manifested by the "clear, unambiguous language of the AOPA."<sup>229</sup> The court rejected, however, the property owner's additional claim that she qualified for administrative review as an "aggrieved or adversely affected" person merely by her status as a citizen of Indiana.<sup>230</sup>

The court went on to evaluate whether there was substantial evidence to support the OEA's decision to deny the property owner's standing to seek administrative review. The court's reversal turned on a procedural point. Lilly filed its motion to dismiss the property owner's petition based on Indiana Trial Rule 12(B)(1). The OEA considered materials outside of the property owner's petition, converting the motion to dismiss into a motion for summary judgment to be adjudicated pursuant to Indiana Trial Rule 56. Lilly's evidence in support of dismissal consisted of unsworn statements in its motion to dismiss. Lilly claimed, for example, that the property in which the property owner claimed an interest was located upstream from the point where Lilly's facility discharged water pursuant to the NPDES permit.<sup>231</sup> The court of appeals held that such unsworn statements did not constitute substantial evidence sufficient to support

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224. *Huffman v. Ind. Dep't of Env'tl. Mgmt.*, 788 N.E.2d 505, 507 (Ind. Ct. App. 2003).

225. *Id.*

226. *Id.*

227. *Id.* at 508 (quoting *Bagnall v. Town of Beverly Shores*, 726 N.E.2d 782, 786 (Ind. 2000); BLACK'S LAW DICTIONARY 43 (6th ed. 1991)).

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 509.



dismissal of the property owner's petition under AOPA.<sup>232</sup> Although vacated, *Huffman* demonstrates the breadth of the "aggrieved or adversely affected" standard in Indiana administrative law and further emphasizes the importance of adherence to the Indiana Trial Rules in administrative proceedings.

### *C. Admissibility of Expert Testimony in Environmental Cases*

Environmental cases, including toxic tort cases, frequently turn on highly technical issues that invite battles of the experts and challenges to expert opinions on reliability/admissibility grounds. Recent Indiana appellate decisions confirm that these battles rage on.

The dispute in *Armstrong v. Cerestar USA, Inc.*<sup>233</sup> involved a truck driver's fall from the top of a tanker truck allegedly caused by his exposure to hydrogen sulfide fumes during a sludge removal operation. The plaintiff's expert opined that the plaintiff was exposed to a hazardous concentration of hydrogen sulfide gas while pumping the sludge into his tanker, that as a result of the exposure the plaintiff became disoriented and/or lost his balance and fell, and that under the Occupational Safety and Health Administration ("OSHA") guidelines, the sludge material being removed met the definition of hazardous material.<sup>234</sup> The trial court found the opinions to be unreliable and inadmissible pursuant to Indiana Evidence Rule 702.<sup>235</sup> The Indiana Court of Appeals identified relevant factors in the reliability/admissibility determination:

While there is no absolute test for determining when testimony is reliable, some factors are: 1) whether the theory or technique can be or has been empirically tested; 2) whether the theory or technique has been subjected to peer review and/or publication; 3) whether there is a known or potential rate of error, as well as the existence and maintenance of standards controlling the theory or technique's operation; 4) whether the theory or technique is generally accepted within the relevant scientific community.<sup>236</sup>

The court reviewed the expert's qualifications which included sixteen years with OSHA and his status as a Certified Safety Professional and Certified OSHA Instructor for General Industry and Construction.<sup>237</sup> The expert admitted: (1) he did not conduct any of his own tests at the plant at issue; (2) he did not attempt to calculate the level of hydrogen sulfide to which the plaintiff might have been exposed; (3) no one could conduct such a test with any degree of confidence; (4) environmental conditions about which no data was available could have affected the level of hydrogen sulfide in the air at the time of the plaintiff's fall; (5) he did not know how tall the plaintiff was or what he had weighed at the time of the fall;

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232. *Id.* at 511.

233. 775 N.E.2d 360 (Ind. Ct. App. 2002).

234. *Id.* at 366.

235. *Id.* at 368 (citing *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 593-95 (1993)).

236. *Id.* at 366.

237. *Id.* at 367.

(6) he did not know the tanker make and model and had not examined the tanker; (7) he had never been involved in a similar case; and (8) that he had not read the plaintiff's deposition.<sup>238</sup> Based on these admissions, the fact that the expert was not a licensed physician with training, knowledge and experience to make the proximate cause determination that the plaintiff became light-headed due to exposure to hydrogen sulfide gas and the expert's failure to exclude other possible causes of the plaintiff's fall, the court of appeals affirmed the trial court's ruling granting the defendant's motion to strike the expert's testimony.<sup>239</sup>

The dispute in *Outlaw v. Erbrich Products Co.*<sup>240</sup> arose from injuries allegedly caused by workplace exposure to a toilet bowl cleaner. The case prompted two trips to the court of appeals, which remanded both times followed by a third trip to the court of appeals. Three experts sparred over whether the claimant's injury resulted from chemical exposure in the workplace as opposed to the claimant's many years of smoking cigarettes. The court of appeals ultimately affirmed the Indiana Worker's Compensation Board's ("Board") conclusion that the claimant was not entitled to benefits because her severe respiratory problems did not appear to be caused by the exposure to chemicals involved in the claimant's job of producing toilet bowl cleaner.<sup>241</sup> The pitfalls encountered by the claimant's experts are instructive.

The claimant worked on assembly lines producing and bottling products ranging from mustard and vinegar to bleach and toilet bowl cleaner.<sup>242</sup> The claimant mostly worked on the line that produced toilet bowl cleaner.<sup>243</sup> She began medical treatment for severe respiratory problems in 1991 and eventually quit her job.<sup>244</sup> She saw one Dr. Schaphorst who referred her to Dr. Garcia.<sup>245</sup> Dr. Garcia examined the claimant and issued a report that linked the claimant's respiratory problems to toilet bowl cleaner that the claimant had indicated contained ammonia, hydrochloric acid, acetic acid, formaldehyde, and fabric softener. In Dr. Garcia's report, the claimant indicated that she had smoked one to two cigarettes per day for almost twenty years but had quit smoking in 1992. Dr. Garcia attributed the claimant's health problems to a combination of cigarette smoking and chemical exposure at work. He assigned her a partial impairment rating of forty percent.<sup>246</sup>

A third doctor, Dr. Waddell, entered the picture in 1994. Dr. Waddell reviewed the claimant's medical records. He noted that, although the claimant claimed to have quit smoking before her respiratory problems ensued, her tests (on December 17, 1992 and February 25, 1993) showed levels of

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238. *Id.*

239. *Id.* at 368.

240. 777 N.E.2d 14 (Ind. Ct. App. 2002).

241. *Id.* at 31.

242. *Id.* at 17.

243. *Id.*

244. *Id.*

245. *Id.* at 17-18.

246. *Id.*



carboxyhemoglobin consistent with the consumption of two to three packs of cigarettes per day.<sup>247</sup> Dr. Waddell challenged the claimant's assertion, reflected in Dr. Garcia's report, that the toilet bowl cleaner contained ammonia and formaldehyde. Apparently these two substances, as a matter of general chemistry, would have neutralized each other. When the dispute turned to whether exposure to hydrochloric acid fumes caused the claimant's lower respiratory distress, Dr. Waddell noted that the claimant did not have the upper respiratory injuries consistent with exposure to hydrochloric acid fumes. Dr. Waddell noted further that the concentration of hydrochloric acid in the toilet bowl cleaner was characterized by such low vapor pressure that a spill would not lead to vaporization of the acid.<sup>248</sup> Dr. Duane Houser, an asthma expert, then joined the dispute in 1998. While generally supporting Dr. Garcia's opinions, Dr. Houser acknowledged that there was no clear connection between exposure to the constituents of the toilet bowl cleaner and the claimant's injuries.<sup>249</sup> At the Board's hearing on this matter, a fellow employee testified that there were frequent spills of the toilet bowl cleaner and that the claimant had quit smoking in 1988.<sup>250</sup>

The Board issued two sets of findings that stated there was not a sufficient connection between any workplace chemical exposure and the claimant's injuries. The court of appeals, in reviewing the Board's findings, noted that a causation analysis based primarily on a temporal connection between exposure and alleged effect is insufficient:

[A]n expert's opinion is insufficient to establish causation when it is based only upon a temporal relationship between an event and a subsequent medical condition. In particular, when an expert witness testifies in a chemical exposure case that the exposure has caused a particular condition because the plaintiff was exposed and later experienced symptoms, without having analyzed the level, concentration or duration of the exposure to the chemicals in questions, and without sufficiently accounting for the possibility of alternative causes, the expert's opinion is insufficient to establish causation because it is based primarily on the existence of a temporal relationship between the exposure and the condition and amounts to subjective belief and unsupported speculation.<sup>251</sup>

The court of appeals concluded, under the standard applicable to judicial review of Worker's Compensation Board determinations, that "the pertinent evidence in the record does not convince us that the evidence leads inescapably to the conclusion opposite to that reached by the Board such that reasonable persons

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247. *Id.*

248. *Id.* at 18-19.

249. *Id.* at 19-20.

250. *Id.* at 20.

251. *Id.* at 29 (citations omitted).

would be compelled to reach the contrary conclusion.”<sup>252</sup>

In *PSI Energy, Inc. v. The Home Insurance Co.*,<sup>253</sup> also discussed earlier in Part I, the Indiana Court of Appeals ruled that expert testimony by the policyholder on causes and timing of contamination was admissible. The policyholder presented expert testimony and reports of an environmental consultant, Thomas Helfrich. Mr. Helfrich opined that leaks of tar and tar-related constituents from subsurface containment structures resulted from the masonry and concrete materials used to construct the structures, the age of the structures (mostly built in the late 1800s), and “the cumulative effect of disruptive events that caused the separation of mortar joints and new and wider cracks to develop continuously in these structures, including during the years 1950 to 1985.”<sup>254</sup> Mr. Helfrich relied on his training and experience as an engineer and his areas of specialization which include “the performance of engineered structures in soils and the investigation and remediation of subsurface contamination.”<sup>255</sup> He also relied on evidence of conditions at the sites in issue and his knowledge of hydraulic pressure inside a fully saturated structure.<sup>256</sup> The expert had personally inspected some of the subsurface containment structures at each site and observed cracks in structure walls.<sup>257</sup> He also relied on his observations at over 150 manufactured gas plant sites not at issue in the case.<sup>258</sup> While admitting that it was not possible to verify his cumulative effects theory through specific observations, measurements, or calculations, he opined that the “cumulative effect of small disruptive events is the only logical explanation for this subsequent separation of mortar joints and cracking and breaking of the structures.”<sup>259</sup>

The insurers, who were seeking to avoid coverage, moved to strike Mr. Helfrich’s “cumulative effects” theory because it could not be empirically tested, it had not been peer-reviewed or even written down, it contained no standard or other bases for applying the theory, and because the theory was not shown to be accepted or even heard of within the relevant scientific community.<sup>260</sup> The policyholder’s response was that the issues involved do not involve complex scientific principles and that its expert had, based on his educational training and expertise and his review of relevant data, “developed a reasoned opinion of the general causes for these subsurface escapes” of contaminants.”<sup>261</sup> The court of appeals quoted *McGrew v. State*,<sup>262</sup> a case involving forensic analysis of hair

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252. *Id.* at 31.

253. 801 N.E.2d 705 (Ind. Ct. App. 2004).

254. *Id.* at 739.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 740.

259. *Id.*

260. *Id.*

261. *Id.*

262. 682 N.E.2d 1289, 1291 (Ind. 1997).



specimens, for the proposition that some types of scientific analysis were “more a matter of the observations of persons with specialized knowledge than a matter of scientific principles governed by Indiana Evidence Rule 702(b).”<sup>263</sup> The court of appeals agreed with the policyholder that its expert’s theory is “reliably based on his observations and application of his specialized knowledge to those observations.”<sup>264</sup> The court noted that the expert’s theory would be subject to cross-examination at trial.<sup>265</sup>

The underlying reasoning of *Armstrong*, *Outlaw*, and *PSI* is consistent. The more closely linked health effects are to the type, amount, and duration of exposure, the better. Matters of observation based on an expert’s background and training need not be empirically tested or peer-reviewed. Explicit evaluation of different possible causes for an effect enhance the reliability of an opinion. Although further debate about the reliability of scientific evidence that litigants seek to introduce to prove or disprove the validity of chemical exposure and other types of environmental claims is a certainty, the utility of common sense and careful advocacy in these scientific matters is clear.

### C. The Scope of Public Nuisance Claims—*Gary v. Smith & Wesson*

In *City of Gary v. Smith & Wesson*,<sup>266</sup> a decision with both national significance and intriguing potential application to environmental matters, the supreme court allowed Gary to sue gun manufacturers under the public nuisance statute and for negligence.

*City of Gary* is a suit in which Gary seeks damages from gun manufacturers, distributors, and dealers for damages and injunctive relief for conducting their business in a way which unreasonably interfered with public rights in the City of Gary. The nuisance claim arises under both section 821B of the Restatement (Second) of Torts and section 32-30-6-6 of the Indiana Code. The statute reads: “Whatever is: (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property; so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action.”<sup>267</sup>

Applying the common law rule of reasonableness, the court concluded that an actionable nuisance is “an activity that generates injury or inconvenience to others that is both sufficiently grave and sufficiently foreseeable that it renders it unreasonable to proceed at least without compensation to those that are harmed.”<sup>268</sup>

The City claimed the gun manufacturers, distributors and dealers know that the foreseeable laxness of dealers and their employees and the ingenuity of criminals will result in guns finding their way to illegal uses. The defendants

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263. *PSI*, 801 N.E.2d at 741 (internal quotations omitted).

264. *Id.*

265. *Id.*

266. 801 N.E.2d 1222 (Ind. 2003).

267. IND. CODE § 32-30-6-6 (2003).

268. *City of Gary*, 801 N.E.2d at 1231.

asserted that a public nuisance must involve violation of a statute, the use of land, or an independent tort. The court rejected these supposed prerequisites, as well as the claim that state gun law regulation pre-empted local litigation.<sup>269</sup> While noting the challenges the City faced in proving specific damages, the court declined to hold that damages from illegal gun sales are too remote to be actionable.<sup>270</sup> The court also reversed the court of appeals' dismissal of the City's negligence claim, holding that all persons in the chain of distribution have a duty not to facilitate illegal gun ownership.<sup>271</sup>

The decision has important implications for environmental litigation and regulation. Nuisance and negligence theories have added vitality. Municipal entities may use the nuisance statute and the common law to compel cleanups even for activities that once were completely legal and from persons which do not own the land but are in some way responsible for its condition. This in turn may facilitate pursuit of former owners' insurers.

### CONCLUSION

*PSI* and its predecessors have given Indiana an important boost in addressing the vast costs of cleaning an industrial environment. That law is a consistent application of principles arising from the unique nature of liability insurance.

The frontiers of environmental obligation continue to expand and contract. Clean air litigation, in particular, shows how difficult it is to develop consistent, equitable standards for the cleanliness of our environment in cases over statutes and regulations which are unclear.

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269. *Id.* at 1231-41.

270. *Id.* at 1240-41.

271. *Id.* at 1241-47.



# RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

JEFF PAPA\*

## INTRODUCTION

The Indiana Rules of Evidence (Rules) have now been in place for a decade. Ten years of interpretation and clarification now assist the Indiana legal community in applying the Rules and also in understanding the similarities and differences between these Rules and the Federal Rules. Some areas of the Rules are still being refined in terms of surviving aspects of common law and ongoing legislative changes.

This Article explains many of the developments in Indiana evidence law during the period between October 1, 2002, and September 30, 2003. The discussion topics are grouped in the same subject order as the Rules.

### I. SCOPE OF THE RULES: IN GENERAL

According to Rule 101(a), the Rules apply to all Indiana court proceedings except where "otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court."<sup>1</sup> In situations where the "rules do not cover a specific evidence issue, common or statutory law shall apply."<sup>2</sup> This leaves the applicability of the Rules open to debate.

The wording of Rule 101(a), requiring the application of statutory or common law in areas not covered by the Rules, has been interpreted by the Indiana Supreme Court to mean that the Rules trump any conflicting statute.<sup>3</sup>

### II. JUDICIAL NOTICE

#### A. *Judicial Notice of Items in Court's Own Files*

In *Sanders v. State*,<sup>4</sup> Sanders appealed his convictions for forgery and theft. As part of his defense for passing and spending the proceeds of a false check, Sanders alleged that a co-worker at Red Lobster had given the check to him. However, in a letter Sanders wrote to the trial judge, he claimed he had been working at O'Charley's for two-and-a-half years.<sup>5</sup>

In determining guilt during a bench trial, the trial judge noted that the case

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1. IND. R. EVID. 101(a).

2. *Id.*

3. See *Williams v. State*, 681 N.E.2d 195, 200 n.6 (Ind. 1997); *Humbert v. Smith*, 664 N.E.2d 356, 357 (Ind. 1996).

4. 782 N.E.2d 1036 (Ind. Ct. App. 2003).

5. *Id.* at 1037.

turned on the defendant's credibility. The judge took judicial notice of the letter that Sanders had written to him, and compared it to the information regarding employment that Sanders presented at trial. Noting this inconsistency and several others, the court found Sanders guilty.<sup>6</sup>

Sanders argued on appeal that it was improper under Rule 201(a) for a court to take judicial notice of a letter in its file.<sup>7</sup> However, the cases cited by Sanders referred to courts which had improperly noticed letters from the files of *other* persons.<sup>8</sup> The applicable law is that "[a] trial judge may take judicial notice of the pleadings and filings in the very case that is being tried,"<sup>9</sup> and that the "court may take judicial notice of a fact, or of the contents of the pleadings and filings in the case before it . . . ."<sup>10</sup>

The court held that a court may take judicial notice of a letter in its file if the requirements of Rule 201(a) are met, and noted that a court may take judicial notice of a fact whether requested by a party or not.<sup>11</sup> The court noted that the contention that Sanders worked for O'Charley's for two-and-a-half years was not a proper subject for judicial notice, but the fact that Sanders had written a letter claiming to have done so was proper. The fact that he had written the letter was a fact capable of ready and accurate determination by simply asking Sanders if he wrote the letter.<sup>12</sup>

### *B. Failure to Give Instruction on Judicial Notice*

In *French v. State*,<sup>13</sup> French appealed his conviction in part due to the trial court's failure to instruct the jury on judicially-noticed exhibits as required by Rule 201(g).<sup>14</sup> The trial court did not give this instruction, nor was it requested.

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6. *Id.* at 1037-38.

7. *Id.* at 1038. Rule 201(a) states that

[a] court may take judicial notice of a fact. A judicially-noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

IND. R. EVID. 201(a).

8. *Sanders*, 782 N.E.2d at 1038 n.3 (citing *State v. Hicks*, 525 N.E.2d 316, 317 (Ind. 1988); *Hutchinson v. State*, 477 N.E.2d 850, 854 (Ind. 1985); *Szymenski v. State*, 500 N.E.2d 213, 215 (Ind. Ct. App. 1986)).

9. *Id.* at 1038 (citing *Owen v. State*, 396 N.E.2d 376, 381 (Ind. 1979)).

10. *Id.* (citing *Sumpter v. State*, 340 N.E.2d 764, 769 (Ind. 1976)).

11. *Id.* Rule 201(c) provides that "[a] court may take judicial notice, whether requested or not." IND. R. EVID. 201(c).

12. *Sanders*, 782 N.E.2d at 1038-39.

13. 778 N.E.2d 816 (Ind. 2002).

14. *Id.* at 822. Rule 201(g) provides that "[i]n a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." IND. R. EVID. 201(g).



French argued that this constituted fundamental error, despite his failure to request the instruction at trial.<sup>15</sup> The court noted that the instruction would have been required if requested, but since there was no indication in this case that the judicially noticed facts were incorrect, there was no fundamental error.<sup>16</sup>

### III. RELEVANCE AND PROBATIVE VERSUS PREJUDICIAL

#### A. Admission of Character Evidence Used for Other Purposes

In *Malinski v. State*,<sup>17</sup> Malinski appealed his convictions for murder and related crimes. Malinski had been found guilty of abducting and murdering a woman whose body had not been found. Although sexually-explicit photographs of the victim in bondage were found in Malinski's possession, he argued that he and the victim had been engaged in a consensual affair, that she had been very unhappy with her life and planned to disappear, and that he did not know what had eventually become of her.<sup>18</sup>

In part, Malinski argued that his convictions were improper because the State had been allowed to introduce evidence at trial of the victim's church activities, her close relationship with family and friends, her good work ethic and ability, her supportive nature and her love for animals. Malinski argued that this evidence was character evidence prohibited by Rule 404(a)(2),<sup>19</sup> but the State claimed that the evidence had been offered to rebut Malinski's claim that the victim had been unhappy in her marriage.<sup>20</sup>

The court agreed with the State and held that the evidence was not prohibited character evidence, but rather that it had been offered to prove that the victim was happy in her marriage and her relationship with her family and to demonstrate her ties to the community and the types of activities she engaged in with her husband. This evidence simply countered Malinski's assertion that the victim was engaged in an affair with him and that she was planning to disappear.<sup>21</sup> In fact, in a footnote, the court pointed out that it would be contradictory to hold that Malinski's claim that the victim was *unhappy* did not raise character issues, while at the same time holding that the State offering evidence that she was *happy* would raise such issues.<sup>22</sup>

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15. *French*, 778 N.E.2d at 822.

16. *Id.* at 822-23.

17. 794 N.E.2d 1071 (Ind. 2003).

18. *See id.* at 1073-77.

19. Rule 404(a)(2) in relevant part prohibits evidence of a victim's character or character trait from being used by the State to show action in conformity with that evidence on a particular occasion unless the State is rebutting a claim of character made by the accused. IND. R. EVID. 404(a)(2).

20. *Malinski*, 794 N.E.2d at 1082-83.

21. *See id.* at 1083.

22. *See id.* at 1083 n.6.

### *B. Exclusion of Prior False Confession*

In *Swann v. State*,<sup>23</sup> Swann appealed his conviction for murder. He claimed that he had falsely confessed to the crime in return for food and cigarettes offered by the police, and that the trial court had improperly excluded evidence of a prior false murder confession given by Swann.<sup>24</sup>

The court determined that the trial court had properly excluded this evidence under Rule 404(b), because "Swann's attempt to introduce evidence of his prior false confession improperly sought to use proof of that prior extrinsic act to bolster his statement that he lied when giving his confession in this case."<sup>25</sup> The court noted that Swann was free to testify that he lied, free to present his alibi defense, and that Swann had known specific details regarding the murder scene.<sup>26</sup>

### *C. Evidence of Prior Bad Acts Intrinsic to the Crime Charged*

In *Cowan v. State*,<sup>27</sup> Cowan had been convicted for receiving stolen property due to his involvement in a scheme in which he received items purchased by a friend with a stolen checkbook in exchange for drugs. He argued that evidence of his drug use and drugs-for-merchandise plan was highly prejudicial and not relevant to the charge of receiving stolen property and that evidence of prior bad acts by other persons was irrelevant and prejudicial.<sup>28</sup>

In reviewing relevant law, the court stated that the rationale of Rule 404(b) is that the "jury is precluded from making the forbidden inference that the defendant had a criminal propensity and therefore engaged in the charged conduct"<sup>29</sup> and that 404(b) rulings are examined to determine whether evidence of a prior bad act is relevant to some issue other than propensity to commit the act and to balance the probative value of such evidence against its prejudicial effect.<sup>30</sup> Also significant was the supreme court's holding that "provisions of Evid. R. 404(b) do not bar the admission of evidence of uncharged criminal acts that are 'intrinsic' to the charged offense."<sup>31</sup>

Using this analysis, the court determined that the other acts and drug usage were the basis for the crimes that followed and were necessary to understand and explain the incidents. The drug usage and other uncharged criminal acts were inextricably bound up with the forgery spree, and the evidence of other bad acts by the forgers were necessary to show that Cowan knew the property had been stolen—an essential element of the crime Cowan had been charged with.<sup>32</sup>

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23. 789 N.E.2d 1020 (Ind. Ct. App. 2003).

24. *Id.* at 1024.

25. *Id.*

26. *Id.* at 1025.

27. 783 N.E.2d 1270 (Ind. Ct. App. 2003).

28. *Id.* at 1274.

29. *Id.* 1275 (citing *Monegan v. State*, 721 N.E.2d 243, 248 (Ind. 1999)).

30. *Id.*

31. *Id.* (citing *Lee v. State*, 689 N.E.2d 435, 439 (Ind. 1999)).

32. *Id.*



Similarly, in *Willingham v. State*,<sup>33</sup> Willingham argued that during his trial for dealing in cocaine, the State was improperly allowed to introduce evidence that, subsequent to a search of his house, Willingham had admitted selling cocaine the week before. Prior to trial, the State had agreed to a motion in limine barring evidence of other crimes, wrongs, or acts. Willingham argued that the testimony about the prior sale was forbidden by the motion in limine.<sup>34</sup>

The court first noted that a motion in limine is not a determination on ultimate admissibility but a bar on presenting such evidence to a jury until the court has ruled on its admissibility.<sup>35</sup> The court agreed with the State that the evidence of the prior act was evidence of Willingham's motive to sell drugs and therefore inextricably bound with the crime charged. The court also found that the evidence was not unfairly prejudicial because it was not evidence of other wrongs, but of the charged offense.<sup>36</sup>

However, in *Vertner v. State*,<sup>37</sup> the court reached a different conclusion. Vertner had been convicted for fleeing law enforcement and reckless possession of paraphernalia. An anonymous victim/witness had flagged down a police car and told the officers he had just been robbed by the vehicle that was speeding away. The officers eventually caught the fleeing suspect and found him in possession of drug paraphernalia. At trial, the officer testified about the statements made by the alleged victim regarding the robbery.<sup>38</sup>

On appeal, Vertner argued that this was inadmissible hearsay, and the State responded that it was merely describing the course of the police investigation. Because the fact that a robbery may have occurred was irrelevant to any of the issues at trial, the reason that the police pursued Vertner was not contested, and the risk of unfair prejudice was high, the court found the trial court was in error when it failed to grant a motion in limine prohibiting this specific testimony. However, the error was held to be harmless.<sup>39</sup>

In *Manuel v. State*,<sup>40</sup> Manuel appealed his convictions for child molesting in part because the child victim had been allowed to testify as to prior, uncharged molestations. The State argued that this testimony was admissible to show a relationship between the parties and to prove identity.<sup>41</sup>

The court stated that the victim's testimony was too vague to provide a basis for admitting the testimony as evidence of "signature crimes" and was therefore inadmissible under Rule 404(b).<sup>42</sup> The only purpose for the testimony was to demonstrate that Manuel had a propensity to molest children. However, the court

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33. 794 N.E.2d 1110 (Ind. Ct. App. 2003).

34. *Id.* at 1115.

35. *Id.* at 1116. (citing *Herrera v. State*, 710 N.E.2d 931, 935 (Ind. Ct. App. 1999)).

36. *Id.* at 1116-17.

37. 793 N.E.2d 1148 (Ind. Ct. App. 2003).

38. *Id.* at 1152.

39. *Id.*

40. 793 N.E.2d 1215 (Ind. Ct. App. 2003).

41. *Id.* at 1219.

42. *Id.*

determined that it was not fundamental error to allow the testimony as other, properly admitted evidence was sufficient to sustain the convictions.<sup>43</sup>

#### *D. Prior Bad Acts Used to Prove Identity*

In *Browning v. State*,<sup>44</sup> Browning appealed his convictions for attempted rape and related crimes. At trial, the State had introduced evidence that other young women had selected Browning's photo from arrays as someone who had approached them and exposed himself or made aggressive sexual requests as they walked or ran on the Anderson University campus. The victim Browning attacked had testified that he had attacked her while running, attempted to remove her clothes, made aggressive sexual requests, and placed his fingers into her rectum.<sup>45</sup>

On appeal, Browning argued that the trial court had improperly admitted the evidence of prior bad acts. The trial court had taken into consideration Rule 404(b)'s ban on admission of evidence of other misconduct to prove action in conformity with a character trait, but also noted that evidence of other bad acts can be used for other purposes, such as proof of identity.<sup>46</sup>

The court noted that "the identity exception in Rule 404(b) was crafted primarily for crimes so nearly identical that the modus operandi is virtually a 'signature.'"<sup>47</sup> While all of the other incidents were very similar, the court found they all differed from the incident in question in several ways. The incident for which Browning was convicted was the only one which involved physical contact, the only one in which the victim was approached on foot, and the only one in which the assailant did not expose himself or include sexual comments in his approach. Because these differences made the similarities only general in nature, the evidence was not admissible under Rule 404(b). The court therefore ordered a new trial for Browning.<sup>48</sup>

#### *E. Prior Bad Acts Used to Prove Motive*

In *Bassett v. State*,<sup>49</sup> Bassett appealed his convictions for murder. At trial, the State had presented testimony from two witnesses who twelve and sixteen years earlier claimed Bassett had raped them and threatened to kill them if they told anyone. The State had successfully argued that these previous incidents were proof of identity or motive, and that Bassett had committed the murders in question (and made the threats twelve and sixteen years ago) in order to avoid probation revocation.<sup>50</sup>

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43. *Id.*

44. 775 N.E.2d 1222 (Ind. Ct. App. 2002).

45. *Id.* at 1223-24.

46. *Id.* at 1224.

47. *Id.* (quoting *Allen v. State*, 720 N.E.2d 707, 711 (Ind. 1999)).

48. *Id.* at 1225.

49. *Bassett v. State*, 795 N.E.2d 1050 (Ind. 2003).

50. *Id.* at 1053.



The court found this evidence was admitted in error as the previous incidents did not qualify as “signature crimes,” and that the defendant’s motive to threaten two women more than ten years ago is not proof of his motive to commit the present murders. In the court’s view, this would be little more than convicting the defendant for committing other crimes in the past.<sup>51</sup>

In *Ziebell v. State*,<sup>52</sup> Ziebell appealed his convictions for murder and related crimes. Ziebell argued that the trial court had abused its discretion by admitting evidence of Ziebell’s prior uncharged drug dealings.<sup>53</sup>

The court first examined whether the evidence of drug dealing was relevant to any issue other than Ziebell’s propensity to commit murder. The court found that the testimony regarding drugs had been introduced to demonstrate motive and was therefore relevant to the issue of motive, as the State’s theory was that Ziebell had murdered the victim because he believed the victim was a confidential drug informant whose information had led to charges against Ziebell.<sup>54</sup>

Once the court found this hurdle of Rule 404(b) had been overcome, it then looked to see if the testimony’s probative value outweighed its prejudicial effect under Rule 403. The court determined that it could not say that the probative value was substantially outweighed by the prejudicial effect, and held that the trial court had not abused its discretion in admitting the testimony.<sup>55</sup>

#### *F. Bifurcated Trial Where Evidence Allowed Under One Charge Is Prejudicial in Another*

In *Hines v. State*,<sup>56</sup> Hines was charged with Robbery and with Unlawful Possession of a Firearm by a Serious Violent Felon. Hines requested a bifurcated trial on the basis that evidence necessary to prove his status as a Serious Violent Felon would subject him to unfair prejudice on the charge of Robbery.<sup>57</sup>

The court agreed with Hines that under Rule 403 the prejudice associated with the prior conviction evidence substantially outweighed its probative value on the Robbery charge. The court reversed and remanded for a bifurcated trial.<sup>58</sup>

#### *G. Testimony of Previous Sexual Partners*

In *Johnson v. State*,<sup>59</sup> Johnson appealed his convictions for failure of carriers

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51. *Id.*

52. 788 N.E.2d 902 (Ind. Ct. App. 2003).

53. *Id.* at 908.

54. *Id.* at 909.

55. *Id.*

56. 794 N.E.2d 469 (Ind. Ct. App. 2003).

57. *Id.* at 473.

58. *Id.* at 474. Rule 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .” IND. R. EVID. 403.

59. 785 N.E.2d 1134 (Ind. Ct. App. 2003).

of dangerous communicable diseases to warn persons at risk. Johnson had been convicted for infecting his partners with HIV without informing them that he was a carrier of the disease. At trial, several women (not the victims at issue) had testified that they had been his sexual partners in the past and later tested positive for HIV.<sup>60</sup>

On appeal, Johnson argued that the testimony of the non-victim previous partners was inadmissible evidence of prior bad acts, and that it was introduced only to show that Johnson had a propensity to have sex with people. The court agreed that the evidence would have been admissible if used to show that he must have engaged in the relationships in question because he had engaged in several similar relationships in the past. However, the court found that the testimony was proper under Rule 404(b) both to establish Johnson's status as HIV-positive and to establish his knowledge of that fact.<sup>61</sup>

#### *H. Prejudicial Effects of Photographs of Deceased Victim*

In *Martin v. State*,<sup>62</sup> Martin appealed his conviction for battery. In part, he argued that photographs of the deceased victim should not have been admitted. Martin contended that the value of the photographs was minimal because there was no dispute that the defendant had died, and the photographs were extremely prejudicial because they showed extreme swelling, blood, and an intubation tube.<sup>63</sup>

However, Martin had defended the charge of battery by claiming that he had acted in self-defense. The court found that even though the photographs were prejudicial, they showed the victim in an unaltered state, and they were highly relevant as the State had responded to Martin's defense with the counter-argument that Martin had used excessive force. Because the court could not conclude that this probative value was substantially outweighed by the potential prejudicial effects, it concluded that the trial court had abused its discretion in allowing the photographs.<sup>64</sup>

In *Ketcham v. State*,<sup>65</sup> Ketcham appealed his conviction for voluntary manslaughter, claiming that a photograph of the victim's heart removed from his body was unfairly prejudicial. The photograph in question showed the heart and the bullet hole in the heart as well as a ruler showing the relative measurements.<sup>66</sup>

The pathologist testified about how he had removed the heart as a standard procedure and used the photo to show trajectory of the bullet through the heart and into other areas and that this was one of several fatal wounds due to the

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60. *Id.* at 1139.

61. *Id.* at 1140 (citing *Fuller v. State*, 674 N.E.2d 576, 578 (Ind. Ct. App. 1996)).

62. 784 N.E.2d 997 (Ind. Ct. App. 2003).

63. *Id.* at 1008.

64. *Id.*

65. 780 N.E.2d 1171 (Ind. Ct. App. 2003).

66. *Id.* at 1179.



bullet.<sup>67</sup> Because the doctor clearly testified that he (as opposed to Ketcham) had removed the heart and the heart was separated from other body parts without the presence of blood, the photo did not unfairly prejudice the trier of fact against Ketcham. Also, the probative value of the photo was strong because it demonstrated that Ketcham likely intentionally, rather than recklessly, killed the victim.<sup>68</sup>

*I. To Whom Does Rule 404(b) Apply?*

In *Garland v. State*,<sup>69</sup> Garland appealed her convictions for murder and conspiracy to commit murder. She had watched while her therapist shot her husband in the head.<sup>70</sup>

At trial, Garland attempted to present evidence of the shooter's motive that would show he was acting alone for his own reasons. Garland wished to offer the testimony of a third party that the shooter had offered to get him a clean driving license for \$1200, failed to deliver the license, and then threatened to shoot the third party if he continued to demand the return of his money. Garland offered this evidence as "signature crime" evidence to show that the shooter had offered to clean Mr. Garland's criminal record for \$1200, and when the Garland's asked for their money back, the shooter killed Mr. Garland.<sup>71</sup>

The trial court granted the State's motion in limine excluding this evidence based on a Rule 404(b) determination that it was evidence of prior bad acts. Garland appealed, contending that the evidence was admissible as proof of identity or motive under Rule 404(b). In order to determine the appropriate outcome, the court looked to recent rulings applying Rule 404(b) to evidence about bad acts of non-parties<sup>72</sup> and held that "the admissibility of evidence about prior bad acts by persons other than defendants is subject to Rule 404(b)."<sup>73</sup>

Under this holding, the court stated that if the offered testimony was probative on either identity or motive it would be admissible. In analyzing this issue the court decided that the two acts were not similar enough to constitute a "signature crime" (one person was murdered, the other was a victim of intimidation in some other place and time) and that the victim simply asking for his money back would not have given the shooter a motive to kill him.<sup>74</sup>

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67. *Id.*  
68. *Id.*  
69. 788 N.E.2d 425 (Ind. 2003).  
70. *Id.* at 428.  
71. *Id.*  
72. *Id.* at 430. The court noted that courts have begun to allow the use of a "reverse 404(b)" procedure, allowing the introduction evidence of someone else's conduct if it tends to negate the defendant's guilt. Traditionally, 404(b) had been used by the defendant to exclude evidence about his own prior bad acts. *Id.*  
73. *Id.*  
74. *Id.* at 430-31.

*J. Erroneous Admission of Character and Prior Bad Acts as Fundamental Error*

In *Oldham v. State*,<sup>75</sup> the State had been allowed to introduce several items found in Oldham's room, including business cards and a novelty photograph containing phrases such as "Considered armed and dangerous," "America's Most Wanted," "Approach with extreme caution," and "Wanted for: robbery, assault, arson, jaywalking."<sup>76</sup> Oldham both failed to object to the use of these items at trial and stipulated to admission of the evidence. Because he had invited the error, Oldham claimed fundamental error on appeal.<sup>77</sup>

The State argued that the items were merely gag items, and that they were used to establish ownership of another nearby item of evidence, Oldham's shirt. Oldham argued that this did not defeat Rule 404(a)'s ban on use of character evidence or Rule 404(b)'s ban on use of prior bad acts to show action in conformity therewith.<sup>78</sup> Because the ownership of the shirt did not appear to be in question and because the State had clearly questioned Oldham as to the dangerous implications of his business cards and novelty photograph, the court found use of this evidence was fundamental error. The court seemed further influenced by the lack of a witness to the murder and the fact that the jury deadlocked for several hours, increasing the likelihood that the verdict was narrowly reached and may have been improperly influenced by the improper character evidence.<sup>79</sup>

*K. Evidence of Guns Unrelated to the Crime Inadmissible*

Oldham further argued that the admission of photographs of two guns found in his garage was also error. Oldham had also stipulated to introduction of this evidence and appealed based on fundamental error.<sup>80</sup>

The guns in question were not used in the crime charged, Oldham's fingerprints were not found on the guns, several other people had access to the garage, and there was no evidence that Oldham even knew the guns were present in the garage. The court found this to be fundamental error as the evidence was irrelevant and, when combined with the erroneous character evidence discussed above, was likely to lead to the prejudicial inference that Oldham was dangerous

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75. 779 N.E.2d 1162 (Ind. Ct. App. 2002).

76. *Id.* at 1171.

77. *Id.* at 1171-72.

78. *Id.* Rule 404(a)(1) provides that

evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) *Character of Accused*. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.

IND. R. EVID. 404(a)(1).

79. *Oldham*, 779 N.E.2d at 1174.

80. *Id.*



and had a store of guns at his disposal.<sup>81</sup>

*L. Trial Court's Failure to Comment on Violation of Motion in Limine*

In *Lehman v. State*,<sup>82</sup> Lehman appealed his convictions for child molestation. At trial, a motion in limine had been granted, prohibiting reference to other investigations of Lehman. Prior to testifying, an investigating officer had been asked to approach the bench and was cautioned about the motion in limine and advised not to refer to polygraphs or prior incidences of molestation involving Lehman. During his testimony the officer referred to the fact that there were nine other investigations of Lehman for child molestation. The defense moved for a mistrial, and the motion was denied. The trial court ordered the comment stricken from the record without further comment.<sup>83</sup>

While the reviewing court would normally give great deference to a trial court's determination of the appropriateness of a mistrial, in this case the trial court made no observations of the effect the testimony may have had on the jury and did not make any record of considering this factor. Because the statement regarding the other victims was extremely prejudicial and inflammatory, the court determined that Lehman was entitled to a new trial.<sup>84</sup>

*M. Multiple Photographs of Child Seduction Victim to Show Victim's Age at Time of Crime*

In *Asher v. State*,<sup>85</sup> the trial court had allowed a series of photographs of the victim to be introduced into evidence. The photographs depicted the victim at the ages of ten, eleven, twelve, and sixteen. The victim was twenty-four years old at the time of trial and the State contended that the photographs were necessary to bridge the jury's perception between the victim's age at time of trial and at the time of the incidents.<sup>86</sup>

The court found that the photographs offered little in the way of probative value, especially in light of the remaining testimony. However, the court noted that Asher failed to demonstrate any prejudice stemming from the photographs and held that the admission of the photographs had not been reversible error.<sup>87</sup>

IV. RAPE SHIELD APPLIED TO OTHER SEX CRIMES

In *Williams v. State*,<sup>88</sup> Williams appealed his conviction for sexual misconduct with a minor. He argued on appeal that the trial court had improperly

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81. *Id.* at 1174-75.

82. 777 N.E.2d 69 (Ind. Ct. App. 2002).

83. *Id.* at 71.

84. *Id.* at 73.

85. 790 N.E.2d 567 (Ind. Ct. App. 2003).

86. *Id.* at 569.

87. *Id.* at 570.

88. 779 N.E.2d 610 (Ind. Ct. App. 2002).

excluded evidence of a prior false accusation by the witness. Importantly, although in a footnote, the court noted that, while the accusation was that of sexual misconduct with a minor and not rape, Rule 412 applies to all prior false accusations of sex crimes. This is because Indiana Rule 412 applies to "sex crimes" and not just the crime of rape, and therefore, the common law exception to prior false accusations of rape also applies to prior false accusations of sex crimes.<sup>89</sup>

Although the court found that this exception would apply, it found no evidence of a prior false accusation in this case. The victim had not admitted to a prior false accusation, and there was merely an inference that a prior accusation was false. Therefore, the court found that the exclusion of this evidence by the trial court had been proper.<sup>90</sup>

## V. PROPER MEDICAL EXPENSES

### A. *Estimates of Future Medical Expenses*

In *Cook v. Whitsell-Sherman*,<sup>91</sup> a couple was caring for another person's dog. During the time the dog was in the couple's care, it bit a mail carrier. The case centered on which party would bear responsibility for the bite under a new statute holding dog owners strictly liable when their dog bites a public servant.<sup>92</sup> However, a second issue was whether the mail carrier's estimates of future medical charges were properly admitted by the trial court and upheld by the Indiana Court of Appeals.<sup>93</sup>

The court stated that

the text of Rule 413 does not support the result reached . . . . The rule does not use the terms "past" or "future" to qualify the types of "statements" to which it applies. But it is limited to "statements." We think the rule uses "statements" not to mean "assertions of fact," but rather as equivalent to "bills" or "charges."<sup>94</sup>

The court went on to say that the "purpose of the Rule also limits its application to statements of past medical charges. In order to recover an award of damages for medical expenses, the party seeking to recover these damages must prove that the expenses were both reasonable and necessary."<sup>95</sup>

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89. *Id.* at 613 n.1.

90. *Id.* at 613.

91. 796 N.E.2d 271 (Ind. 2003).

92. IND. CODE § 15-5-12-1 (Supp. 1997).

93. *See Cook*, 796 N.E.2d at 273-75.

94. *Id.* at 277. Rule 413 states that "[s]tatements of charges for medical, hospital or other health care expenses for diagnosis or treatment occasioned by an injury are admissible into evidence. Such statements shall constitute prima facie evidence that the charges are reasonable." IND. R. EVID. 413.

95. *Cook*, 796 N.E.2d at 277 (citing *Smith v. Syd's Inc.*, 598 N.E.2d 1065, 1066 (Ind. 1992)).



The reasoning behind this conclusion is that, while the rules of evidence concerning hearsay generally prohibit out-of-court statements introduced to prove the truth of the matter asserted, “[m]edical bills already charged can usually be admitted over any hearsay objection either through testimony of the supplier as business records under Indiana Rule of Evidence 803(6) or through testimony of the patient to refresh memory under Rule 803(5).”<sup>96</sup> Therefore, since estimates of future medical expenses are not records of an event that has occurred or helpful in refreshing a person’s memory, they fail to meet these hearsay objections. The court added “[i]ndeed they relate to an event that has not yet occurred and may never occur”<sup>97</sup> and held that Rule “413 does not permit the introduction into evidence of written estimates of future medical costs. Rather, these costs must be established by admissible testimony from competent witnesses.”<sup>98</sup>

### *B. Failure to Link Medical Bills to the Relevant Incident*

In *Sikora v. Fromm*,<sup>99</sup> Fromm had received a jury award of \$275,000 against Sikora stemming from his injuries related to a car accident. On appeal, Sikora noted that some of the medical bills submitted at trial had not been specifically substantiated as stemming from the car accident in question by expert medical testimony.<sup>100</sup> The court agreed and further stated that the particular injuries treated in those bills were not “objective” injuries.<sup>101</sup> This left only the lay testimony of Fromm to tie the bills in question to the car accident, and the admission of these bills was therefore error.<sup>102</sup>

Although it found error, the court refused to disturb the jury award because the award was a single amount for general damages and it could not determine which, if any, portion of the award was due to the particular bills in question. Also, because the jury found Fromm and his expert witnesses to be credible and the expenses were not inconsistent with the injuries described by Fromm and his experts, the court determined that substantial justice was reached and Sikora was not denied a fair trial.<sup>103</sup>

## VI. UNDUE INFLUENCE ON THE JURY

In *Sanchez v. State*,<sup>104</sup> an alternate juror was given instruction not to participate in the deliberations. During the jury’s discussions, the foreman asked

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96. *Id.* at 278 (citing *Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145, 1161 (Ind. Ct. App. 1990)).

97. *Id.*

98. *Cook*, 796 N.E.2d at 278.

99. 782 N.E.2d 355 (Ind. Ct. App. 2002).

100. *Id.* at 361.

101. *Id.* (citing *Daub v. Daub*, 629 N.E.2d 873, 877 (Ind. Ct. App. 1994)).

102. *Id.*

103. *Id.*

104. 794 N.E.2d 488 (Ind. Ct. App. 2003).

the alternate to clarify a point, which he did. The foreman immediately stopped deliberation and the judge admonished the jury. The point in question had been written down in the notes of three of the regular jurors.<sup>105</sup>

Although Rule 606(b) provides that an alternate juror is considered an outside influence and may not testify to the jury, alternate jurors have been through voir dire and have heard exactly the same evidence.<sup>106</sup> The court found that the comment by the alternate juror did not place Sanchez in any grave peril because he did not express any opinion on Sanchez's guilt or innocence. He merely confirmed a fact that three regular jurors had written down, the foreman immediately stopped deliberation, the jury was admonished by the judge, and there was sufficient evidence to convict Sanchez.<sup>107</sup>

## VII. IMPEACHMENT

### A. *Impeachment of Own Witness*

In *Martin v. State*,<sup>108</sup> Martin appealed in part because the State had been allowed to use prior statements of several of its witness as impeachment evidence during its case-in-chief. The court began its analysis by noting that Rule 613(b) allows a party to impeach a witness by extrinsic evidence of a prior inconsistent statement, but also noted that parties are prohibited from placing witnesses on the stand for the sole purpose of introducing otherwise inadmissible evidence as impeachment and that, once a party has admitted a prior inconsistent statement, further impeachment evidence is unnecessary.<sup>109</sup>

Over Martin's objection, the trial court had allowed the State to refer to its own witness' prior statement on direct examination under the guise of

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105. *Id.* at 490.

106. *Id.* at 491. (citing *Griffin v. State*, 754 N.E.2d 899, 902 (Ind. 2001)). Rule 606 provides that:

(a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called to so testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.  
(b) Inquiry into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify . . . (2) on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or (3) whether any outside influence was improperly brought to bear upon any juror . . . .

IND. R. EVID. 606.

107. *Sanchez*, 794 N.E.2d at 491.

108. 779 N.E.2d 1235 (Ind. Ct. App. 2002).

109. *Id.* at 1243 (citing IND. R. EVID. 613(b); *Appleton v. State*, 740 N.E.2d 122 (Ind. 2001); *Pruitt v. State*, 622 N.E.2d 469, 473 (Ind. 1993)).



impeachment. The State read through each of the assertions in the prior statement and essentially asked the witness if he had made each of those statements. Martin objected to the leading nature of the questions, but the State was allowed to proceed and treat the witness as a hostile witness.<sup>110</sup>

The court found this to be error because the State had not shown the need to use the document as a recorded recollection (the witness did not show he had no memory of the events) and because the State led the witness through his prior statement as if it were substantive evidence rather than impeachment evidence.<sup>111</sup> However, because the State had provided other sufficient evidence including an eyewitness, the error was found harmless.<sup>112</sup>

### *B. Family as "Community"*

In *Norton v. State*,<sup>113</sup> Norton appealed his convictions for child molesting. At trial, Norton had attempted to have the brother of one of the State's witnesses give impeachment testimony under Rule 608(a) that the witness had a reputation for being untruthful.<sup>114</sup> The reputation that the witness's brother offered to testify to was his reputation within the family. The State objected, claiming that reputation for evidence purposes could not be based on the "community" of a family. The trial court did not allow the impeachment testimony.<sup>115</sup>

The court noted that Indiana requires that an impeaching witness may only speak about the impeachee's reputation within the community.<sup>116</sup> The court noted that the term community is not limited to the greater community at large. Some groups may be large enough, while others are not. In some cases, a family may be large enough to compromise a "community." However, in this case, Norton had presented no evidence on the size of the impeachment witness's family, and the court declined to find error.<sup>117</sup>

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110. *Id.* at 1245.

111. *Id.*

112. *Id.*

113. 785 N.E.2d 625 (Ind. Ct. App. 2003).

114. *Id.* at 629. Rule 608(a) provides that the

credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

IND. R. EVID. 608(a).

115. *Norton*, 785 N.E.2d at 629.

116. *Id.* (citing 13 ROBERT LOWELL MILLER, JR., INDIANA EVIDENCE § 608.103 (2d ed. 1995)).

117. *Id.* at 632.

## VIII. OPINIONS AND EXPERT TESTIMONY

*A. Witness Testimony Regarding Demeanor*

In *Malinski v. State*,<sup>118</sup> the State called several witnesses to testify that the victim had been genuinely upset by an earlier burglary, which Malinski claimed the victim had helped plan. Malinski claimed that this testimony violated Rule 704(b), which prohibits testimony about the truthfulness of a witness.<sup>119</sup> The court, however, held that Rule 704(b) did not apply because the victim was not a witness and because the witnesses were testifying about the victim's demeanor, not whether any claim she made regarding the burglary was truthful or credible.<sup>120</sup>

*B. Expert Testimony of Pathologist Regarding Photograph Subject's Willing Participation*

During Malinski's trial, a forensic pathologist (Dr. Prahlow) testified as to his opinions drawn from a series of photographs taken from Malinski of the victim in various stages of bondage and sexual activity. Dr. Prahlow made conclusions that the victim was an unwilling participant, that she was resisting in some photos, and that she was either unconscious or otherwise unresponsive in other photos. Dr. Prahlow noted contusions and bruises, marks indicative of an effort to escape the handcuffs, hands moved to protect private areas from assault, and wet marks on the sheets in photos where the victim appears to be unresponsive (indicating a loss of bladder control). Dr. Prahlow concluded that the victim was struggling to escape and was an unwilling participant.<sup>121</sup>

Malinski argued that Dr. Prahlow's testimony was inadmissible under Indiana Evidence Rule 702 because the State had failed to lay a scientific foundation for expert scientific testimony as required by Rule 702(b).<sup>122</sup> However, the court stated that this evidence was not a matter of scientific principles controlled by Rule 702(b) but that it was instead expert testimony based on Dr. Prahlow's specialized knowledge. The testimony fell into Dr. Prahlow's specialized knowledge of anatomy and physiology and examining and evaluating wounds such as those found in the photos. The court found that, because Dr. Prahlow had served as a forensic pathologist for four years, he was qualified to make such observations.<sup>123</sup>

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118. 794 N.E.2d 1071 (Ind. 2003). For further discussion of this case, see *supra* text accompanying notes 17-18.

119. Rule 704(b) in part provides that witnesses may not testify to opinions concerning whether a witness has testified truthfully. IND. R. EVID. 704(b).

120. *Malinski*, 794 N.E.2d at 1083.

121. *Id.* at 1084-85.

122. Rule 702(b) provides that "expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable." IND. R. EVID. 702(b).

123. *Malinski*, 794 N.E.2d at 1085-86.



### C. Opinion Testimony Regarding Significance of Covering Victim's Face

In *Kubsch v. State*,<sup>124</sup> Kubsch was convicted of murdering his wife, stepson, and his stepson's father. His wife's body was found with her face covered with duct tape. At trial, a police detective had testified that the victim's face is often covered to disassociate the victim from the perpetrator, and it is more associated with cases in which the killer knows or has a relationship with the victim.<sup>125</sup>

Kubsch argued that this testimony was improper because the State failed to lay a foundation that it was scientifically reliable. The court agreed and stated that the State failed to demonstrate that the general subject of victim/suspect relationships is based on any reliable scientific methodology. It further stated that "testimony that Detective Richmond received instruction on victim/suspect relationships and possesses library books on this area of study is not sufficient to show that it has been generally accepted within the study of social or behavioral sciences."<sup>126</sup> The court noted that certain behaviors may be helpful for investigators to develop clues or prevent crimes, but that those behaviors may not be reliable enough to introduce at trial.<sup>127</sup>

On appeal, however, the State argued that the detective was testifying as a skilled lay observer. The court first noted that this was not the basis on which the testimony was allowed at trial (expert witness) and then analyzed the skilled lay observer claim. Even had this been the basis for testimony at trial, the evidence would have been improper. The court said that there was not anything the detective saw or heard at the scene, or became aware of through his other senses, that supported his opinion. "Rather, the detective's opinion was based on his understanding of a phenomenon which the State in this case has not shown to be scientifically reliable. In sum, his testimony did not qualify as skilled witness testimony under Indiana Evidence Rule 701."<sup>128</sup>

### D. Admission of STR (Short Tandem Repeat) DNA Evidence

In *Overstreet v. State*,<sup>129</sup> Overstreet appealed his convictions for abducting, raping and murdering a young woman. At trial, the State had introduced DNA evidence from the victim's underwear consistent with Overstreet's DNA profile. This evidence was derived from a relatively new process called short tandem repeat (STR) as well as from the more common polymerase chain reaction (PCR) method. Overstreet did not appeal the use of the PCR evidence, but challenged the introduction of the STR evidence.<sup>130</sup>

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124. 784 N.E.2d 905 (Ind. 2003).

125. *Id.* at 920.

126. *Id.* at 921.

127. *Id.* at 922.

128. *Id.* at 922-23. In other words, no matter how street-wise you are, you can't make stuff up.

129. 783 N.E.2d 1140 (Ind. 2003).

130. *Id.* at 1150.

Overstreet did not directly question the validity of the STR procedure, he did not argue that the State's witnesses were unqualified to testify to the test results, and he did not argue that this evidence was unfairly prejudicial. He did argue that the only basis the trial court had to judge the scientific reliability of STR was the testimony of two experts who testified for the State. Overstreet claims that one of those experts was not qualified to testify about the procedure's reliability and that the other witness did not testify on the matter.<sup>131</sup>

In reviewing this claim, the court noted that the State might have done more to establish the reliability of the STR method but did not find reversible error in the admission of this evidence. Overstreet made no argument at trial that STR was unreliable. Two DNA experts testified for the State, and Overstreet did not challenge the qualifications of these experts. The court conducted its own review of STR as well as the qualifications of the State's experts and concluded that the trial court had been within its discretion to admit the evidence.<sup>132</sup>

*E. Ability of Expert's Testimony to Overcome Error in Evidence Handling*

Overstreet also argued that his conviction for rape should be overturned because that crime requires sexual (vaginal) intercourse, and the State's expert had mislabeled the relevant physical evidence. The State had taken both vaginal and anal swabs of the victim for examination. Although the slide marked "anal" showed the presence of Overstreet's DNA and the slide marked "vaginal" did not, the State's expert testified that the slides had somehow been switched and that the slide positive for Overstreet's DNA was actually a vaginal sample. He testified that the composition of the anal sample was actually consistent with a vaginal sample and vice-versa.<sup>133</sup> Overstreet argued that the State's expert should have been qualified as a cytologist in order to testify on this point.<sup>134</sup>

The court, however, found the expert's explanation of the discrepancy plausible and found him qualified to offer the testimony.<sup>135</sup> The expert had a Bachelor of Science degree in biology, several years of experience, and had tested several thousand vaginal samples. A forensic pathologist had also tested a second set of slides that were properly marked and testified to the same conclusion—that DNA consistent with Overstreet's profile had been found in the victim's vagina.<sup>136</sup>

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131. *Id.*

132. *Id.* at 1150-51. The Indiana Supreme Court had previously noted that the clear weight of scientific opinion held that STR was refined and reliable technology. *Troxell v. State*, 778 N.E.2d 811, 816 (Ind. 2002).

133. *Overstreet*, 783 N.E.2d at 1152.

134. *Id.* at 1151-52.

135. *Id.* at 1152.

136. *Id.* at 1151-53.



*F. Expert Versus Skilled Witnesses*

In *Davis v. State*,<sup>137</sup> Davis was convicted of possession of cocaine with intent to deliver. The evidence against Davis included two bags of cocaine he dropped at the time of arrest. The arresting officer provided testimony that the manner of packaging and amount of cocaine indicated that Davis intended to sell, rather than use, the cocaine.<sup>138</sup>

Davis argued that the police officer was not a qualified expert witness under Rule 702<sup>139</sup> and therefore should not have been allowed to testify as to his opinion of Davis' intent. The court found instead that the officer was a skilled witness who was allowed to testify under Rule 701.<sup>140</sup> A skilled witness is "a person with a degree of knowledge short of that sufficient to be declared an expert under Indiana Rule of Evidence 702, but somewhat beyond that possessed by the ordinary jurors."<sup>141</sup>

The police officer testified that he had been with the police force for sixteen years, over six of which was spent specifically on narcotics crimes. He had received specialized narcotics training and been involved with between 600 to 700 narcotics investigations. The court found that his opinions were rationally based on his perception and personal experience as an investigator and that the testimony had been helpful in determining Davis' intent because it differentiated behavior between drug users and drug dealers. The court determined that the trial court had not abused its discretion in admitting this testimony.<sup>142</sup>

In *Farrell v. Littell*,<sup>143</sup> a custody and visitation dispute, Littell argued that the opinion testimony of a police detective and child welfare agent were improperly excluded. Both individuals offered testimony that they believed Farrell was responsible for the child's sexualized behavior.<sup>144</sup>

Littell contended that the testimony was admissible as testimony of a skilled witness. The court acknowledged that qualification as an expert is only required if the witness's opinion is based on information received from others pursuant to Rule 703 or based on a hypothetical question.<sup>145</sup> However, it noted that to qualify as a skilled witness "not only must the skilled witness have specialized

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137. 791 N.E.2d 266 (Ind. Ct. App. 2003).

138. *Id.* at 267.

139. Rule 702 provides that "a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." *Id.* at 267 n.1 (quoting *Haycraft v. State*, 760 N.E.2d 203, 210 (Ind. Ct. App. 2001)).

140. Rule 701 allows a skilled witness to testify to an opinion or inference that is rationally based on the witness's perception and is helpful to understanding the witness's testimony or determination of a fact in issue. IND. R. EVID. 701.

141. *Davis*, 791 N.E.2d at 267 (quoting *O'Neal v. State*, 716 N.E.2d 82, 88-89 (Ind. Ct. App. 1999)).

142. *Id.* at 268.

143. 790 N.E.2d 612 (Ind. Ct. App. 2003).

144. *Id.* at 617.

145. *Id.* (citing *Cansler v. Mills*, 765 N.E.2d 698, 703 (Ind. Ct. App. 2002)).

knowledge beyond the ken of a lay juror, but he must also give testimony that is rationally based on the perception and testimony that is helpful to the factfinder."<sup>146</sup> In this case the opinion testimony was not helpful as the trier of fact was just as capable of reviewing the evidence and determining guilt or innocence.<sup>147</sup>

### *G. Portions of Expert Testimony Outside Expert's Field*

In *Suell v. Dewees*,<sup>148</sup> an orthopedic surgeon had testified for the defense regarding the injuries Suell claimed to have suffered during a vehicle accident. During part of his testimony, the surgeon had testified as to his belief regarding the likely speed of the automobiles. Suell appealed, arguing that the trial court should have granted her motion in limine to prevent the testimony regarding speed as this was outside the expert's field of expertise.<sup>149</sup>

The court found that this portion of the expert's testimony had indeed been allowed in error. However, the error was rendered harmless by the balance of the expert's testimony regarding Suell's physical injuries (including testimony that the injuries were either pre-existing and/or not consistent with automobile injuries) and by Suell's vigorous cross-examination on his basis for the conclusions regarding speed.<sup>150</sup>

In reaching this decision, the court stated:

If applied to separately evaluate every subsidiary point made during the testimony of a qualified expert regarding matters based on reliable science, Rule 702(b) can become excessively burdensome to the fair and efficient administration of justice. It directs the trial court to consider the underlying reliability of the general principles involved in the subject matter of the testimony, but it does not require the trial court to re-evaluate and micromanage each subsidiary element of an expert's testimony within the subject. Once the trial court is satisfied that the expert's general methodology is based on reliable scientific principles, then the accuracy, consistency, and credibility of the expert's opinions may properly be left to vigorous cross-examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact.<sup>151</sup>

The court found that the trial court had not abused its discretion in allowing the medical expert to give his testimony regarding the speed of the vehicles at the time of the impact.<sup>152</sup>

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146. *Id.*

147. *Id.* at 617-18.

148. 780 N.E.2d 870 (Ind. Ct. App. 2002).

149. *Id.* at 874.

150. *Id.* at 875.

151. *Id.* at 876 (quoting *Sears v. Manvilov*, 742 N.E.2d 453, 461 (Ind. 2001)).

152. *Id.*



### *H. Use of Hypothetical Question in Expert Testimony*

In *Fulton County Commissioners v. Miller*,<sup>153</sup> the appellant County argued that a portion of testimony by Miller's expert witness was improperly admitted because it was improperly tied to the facts of the case and the expert did not conduct testing to determine the exact amount of dust present at the time of the accident in question. Because the expert did not determine the exact levels of dust and other conditions, the State contended that the theories he testified to were pure speculation and did not comply with Rule 702 and supporting case law.<sup>154</sup>

The court noted that while "an expert witness must have observed facts sufficient to enable him to form a valid opinion, those facts may be supplied in the form of a hypothetical question which incorporates facts previously adduced at trial."<sup>155</sup> The expert testified that he did not know how much dust Miller may have encountered, but instead testified to the principles of light attenuation associated with a certain quantity of dust. The court held that the testimony was properly admitted because the lack of factual foundation as to the exact amount of dust did not render speculative the expert's opinion regarding the effect of certain hypothetical amounts of dust on Miller's vision.<sup>156</sup>

### *I. Expert Testimony Regarding Legal Conclusions*

In *Vaughn v. Daniels Co.*,<sup>157</sup> Daniels Co. appealed a judgment in part because it alleged that Vaughn's expert had testified without a sufficient foundation and that the expert had improperly offered legal conclusions. The court found that the first portion of this claim failed because Rule 705 allows experts to rely on hearsay or other normally inadmissible types of evidence if those items are normally relied upon by experts in that field.<sup>158</sup>

However, the court did agree with Daniels Co.'s contention that the expert had improperly testified as to legal conclusions. The court noted that there was a "trend . . . to allow expert opinion testimony even on the ultimate issue of the case, so long as the testimony concerns matters which are not within the common knowledge and experience of ordinary persons and will aid' the trier of fact."<sup>159</sup>

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153. 788 N.E.2d 1284 (Ind. Ct. App. 2003).

154. *Id.* at 1291.

155. *Id.* (quoting *Hughes v. State*, 508 N.E.2d 1289, 1305 (Ind. Ct. App. 1987)).

156. *Id.* at 1291-92.

157. 777 N.E.2d 1110 (Ind. Ct. App. 2002), *clarified by* 782 N.E.2d 1062 (Ind. Ct. App. 2003).

158. *Id.* at 1122. Rule 705 provides that the "expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination." IND. R. EVID. 705.

159. *Id.* (quoting in part *Major v. OEC-Diasonics, Inc.*, 743 N.E.2d 276, 285 (Ind. Ct. App. 2001)).

However, the court concluded that experts should not be allowed to offer legal conclusions as part of their testimony because it would violate the spirit of Rule 704(b). The court held that a judge, not an expert witness, should instruct on the law.<sup>160</sup>

### *J. Opinion Testimony of Non-Expert*

In *Meyer v. Marine Builders, Inc.*,<sup>161</sup> Meyer appealed the decision in part because the President of Marine Builders, Inc. had submitted an affidavit in which he professed his belief as to certain issues. Meyer argued on appeal, that since this evidence was from neither an expert witness nor a land surveyor, it should not have been permitted to introduce opinion testimony.<sup>162</sup>

However, the court looked to Rule 701 and found that the testimony was proper because it was an opinion that a reasonable person could form from the perceived facts.<sup>163</sup> The affiant had stated that he had walked the property and reviewed the maps prior to the sale and that after reviewing additional information he now believed the property lines were incorrectly described.<sup>164</sup>

### *K. Medical Expert Relying on the Work of Others to Develop His Opinion*

In *Hall v. State*,<sup>165</sup> the trial court had excluded the expert testimony of a doctor concerning cause of death because the doctor "(1) did not see [the victim]'s computerized tomography scan ('CT scan'), (2) neither attended nor saw [the victim]'s autopsy, (3) does not conduct autopsies himself, and (4) failed to consider, or at least adequately explain, why other factors were not the cause of [the victim]'s death."<sup>166</sup> However, the court noted that "with the increased division in modern medicine, the physician making the diagnosis must necessarily rely on many observations and tests performed by others; records sufficient for diagnosis in a hospital ought be enough for opinion testimony in the courtroom."<sup>167</sup>

As to the factor criticizing the doctor for not providing alternate reasons for the death, the purpose of his testimony was to provide a theory of death other than that offered by the State. The court held that the testimony was improperly excluded and that the factors enumerated by the trial court would have been

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160. *Id.* at 1123. Rule 704(b) provides that "[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." IND. R. EVID. 704(b).

161. 797 N.E.2d 760 (Ind. Ct. App. 2003).

162. *Id.* at 769.

163. *Id.* (citing *Mariscal v. State*, 687 N.E.2d 378, 380 (Ind. Ct. App. 1997) (finding that an opinion under Indiana Evidence Rule 701 is rationally based, for purposes of the rule, if it is one that a reasonable person normally could form from the perceived facts)).

164. *Id.* at 770.

165. 796 N.E.2d 388 (Ind. Ct. App. 2003).

166. *Id.* at 399.

167. *Id.* at 400 (quoting *Birdsell v. United States*, 346 F.2d 775, 779-80 (5th Cir. 1965)).



appropriate lines of cross-examination.<sup>168</sup>

*L. Expert's Opinion Must be Based on More Than Coincidence*

In *Clark v. Sporre*,<sup>169</sup> Clark argued that the trial court erred when it excluded the testimony of a doctor that it was more probable than not that the surgery and hospitalization caused her injuries. The parties did not dispute the doctor's qualifications to testify as to the nature and extent of Clark's impairment, but they did dispute whether he was qualified to state his opinion on whether the surgery and hospitalization caused the injuries.<sup>170</sup>

The court stated that "[t]o be admissible, an expert's opinion that an event caused a particular injury must be based on something more than coincidence."<sup>171</sup> While the doctor's opinion was based on the assumption that a hypoxic event had caused the injuries, nothing in Clark's hospital record indicated that such an event took place. The doctor also had not reviewed any of the records of Clark's hospitalization. His opinion testimony was therefore simple speculation without any factual basis.<sup>172</sup>

IX. HEARSAY

*A. Victim's State of Mind Not Relevant Where Defendant Claims  
He Was Elsewhere*

In *Kubsch*,<sup>173</sup> discussed above, a witness testified that one of the victims had said he was "frightened" of Kubsch. A second witness said that the same victim had said "[Kubsch] still wants to kill me."<sup>174</sup> Kubsch argued that this evidence was inadmissible hearsay and should have been excluded. The trial court had admitted the statements under Rule 803(3), which allows testimony related to the declarant's then-existing state of mind, emotion, sensation, or physical condition.<sup>175</sup>

However, the Indiana Rules of Evidence also state that only relevant evidence is admissible<sup>176</sup> and that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>177</sup> Because Malinski claimed that he was in another state at the time of the murders,

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168. *Id.*

169. 777 N.E.2d 1166 (Ind. Ct. App. 2002).

170. *Id.* at 1171.

171. *Id.* at 1170-71 (citing *Hannan v. Pest Control Servs., Inc.*, 734 N.E.2d 674, 682 (Ind. Ct. App. 2000)).

172. *Id.* at 1171.

173. 784 N.E.2d 905 (Ind. 2003).

174. *Id.* at 919.

175. *Id.* (citing IND. R. EVID. 803(3)).

176. IND. R. EVID. 402.

177. *Kubsch*, 784 N.E.2d at 919 (quoting IND. R. EVID. 401).

the victim's state of mind had not been put at issue, and therefore, the testimony was not relevant.<sup>178</sup>

*B. Police Officer's Statement as Party Opponent Non-Hearsay*

In *Allen v. State*,<sup>179</sup> Allen argued that the trial court improperly excluded testimony that a police officer threatened to arrest everyone if someone didn't claim guns and drugs found in the house where the arrest later took place. The trial court excluded the testimony as Hearsay, over Allen's objection that it was admissible as the statement of a party opponent under Rule 801.<sup>180</sup> The court stated that rulings regarding excluding or admitting evidence are normally reviewed for an abuse of discretion but that "a ruling is reviewed de novo when it turns on a misunderstanding of a rule of evidence, specifically the hearsay rule."<sup>181</sup>

The court noted that existing case law held that statements made by police officers are not hearsay when used in wrongful death cases against police officers and the municipality,<sup>182</sup> but no Indiana cases had previously addressed the issue in the context of a criminal case.<sup>183</sup> After a review of federal circuit court decisions, the court held that "the party-opponent provision in the Indiana Rules of Evidence applies in criminal cases to statements by government employees concerning matters within the scope of their agency or employment."<sup>184</sup> In reaching this decision, the court noted that the Indiana rule uses the sub-heading "Statement by Party-Opponent" rather than "admission by party-opponent" as found in the federal rules.<sup>185</sup> The court also noted that application of the party-opponent provision against the government also advanced the concept of general fairness.<sup>186</sup>

*C. Victim's State of Mind Where Prosecution Raises the Issue*

In *Bassett*,<sup>187</sup> discussed above, the State was also allowed to introduce testimony of the victim's aunt and husband that she had been afraid of the defendant and that he threatened to kill her. Bassett argued that these statements

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178. *Id.*

179. 787 N.E.2d 473 (Ind. Ct. App. 2003).

180. *Id.* at 478. Rule 801 provides that a statement is not hearsay if the statement is offered against a party and is a party's own statement in either an individual or representative capacity or a statement by a party's agent concerning a matter within the scope of employment. IND. R. EVID. 801(d)(2).

181. *Allen*, 787 N.E.2d at 477 (citing *Hirsch v. State*, 697 N.E.2d 37, 40 (Ind. 1998)).

182. *Id.* at 478 (citing *City of Indianapolis v. Taylor*, 707 N.E.2d 1047, 1057 (Ind. Ct. App. 1999)).

183. *Id.*

184. *Id.* at 479.

185. *Id.*

186. *Id.*

187. *Bassett v. State*, 795 N.E.2d 1050 (Ind. 2003).



were inadmissible hearsay and should have been excluded. The State contended that the statements were properly admitted under the state of mind exception of 803(3) as evidence of motive and the relationship between the parties.<sup>188</sup>

The court noted that it had previously determined that "evidence under the Rule 803(3) state of mind exception must be relevant to the issues in the case, Evid. R. 402, and that a victim's state of mind may be relevant where it has been put in issue by the defendant."<sup>189</sup> The use of this evidence was raised by the State in its opening statement and in its case in chief. The defendant also took the stand and denied having a sexual relationship. Because the defendant had not put the victim's state of mind at issue, the statements were not admissible under the state of mind exception.<sup>190</sup>

The State further argued that the statements were admissible because the defendant was subject to parole violation for engaging in a romantic relationship without permission from his parole officer. Because the State contended that Bassett committed the murders to avoid probation revocation, it argued that the victim's state of mind regarding her relationship with the defendant was relevant to motive. However, the court determined that the state of mind at issue in the statements was her fear of the defendant, which is not logically related to the defendant's motive, and that her thoughts regarding their sexual relationship are not mental or physical conditions contemplated by the state of mind exception.<sup>191</sup> The court reversed the convictions and ordered a new trial.<sup>192</sup>

#### *D. Evidence Used for Other Purposes Is Not Hearsay*

In *Johnson*,<sup>193</sup> discussed above, the State was allowed to introduce a letter from the Social Security Administration which denied Johnson's claim that he was disabled on the basis of testing positive for HIV. The court pointed out that had the letter been offered to prove that Johnson was HIV positive it would have been inadmissible hearsay as it contained information from several doctors who were not available at trial for cross-examination.<sup>194</sup>

However, the letter was used to show why one of the victims confronted Johnson. The trial court had admonished the jury to consider the letter only for the purposes of explaining what led to the confrontation between the victim and Johnson, not for the actual contents of the letter. The letter contained information purporting that Johnson was HIV positive, and the victim testifying about the letter stated that Johnson admitted his HIV positive status after being confronted with the letter.<sup>195</sup> However, because the letter was not offered to

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188. *Id.* at 1051.

189. *Id.* at 1051-52.

190. *Id.* at 1052.

191. *Id.*

192. *Id.* at 1054.

193. *Johnson v. State*, 785 N.E.2d 1134 (Ind. Ct. App. 2003).

194. *Id.* at 1138.

195. *Id.* at 1137.

prove the truth of the information contained in the letter, it was not hearsay.<sup>196</sup>

However, in *Winbush v. State*,<sup>197</sup> a police officer testified at trial that he received a tip a week before the arrest that the defendants were at a certain apartment selling cocaine. The defense objected that this was evidence of prior bad acts prohibited by Rule 404(b), but the trial court allowed the testimony because it was being used to explain the officer's conduct in pursuing the investigation.<sup>198</sup>

The testimony regarding the tip had little relevance to any fact at issue. The defense had offered to stipulate that there was no problem with the quality of the officer's work or the investigation, and the acts mentioned in the tip occurred at a location different from the events for which the defendants were charged. Because it determined the probative value was substantially outweighed by unfair prejudice, the court ruled that the statement should not have been admitted.<sup>199</sup>

### *E. Excited Utterance*

In *Williams v. State*,<sup>200</sup> Williams appealed his convictions for murder, attempted robbery, and related crimes. The trial court allowed testimony from the victim's wife and a police officer about statements the victim made about the incident before he died. Williams argued on appeal that these statements were inadmissible hearsay.<sup>201</sup>

The State argued that the statements were allowed under Rule 803(2) as excited utterances.<sup>202</sup> Williams claimed the statements were not reliable because the victim could have fabricated them in the time between the incident and the time the statements were made in the hospital. However, the court found that the statements were made while the victim was in the emergency room and still in pain from being shot. The court also noted that he had been subject to a startling event and had made the statements soon after being found unconscious and while undergoing treatment to save his life. The court found that, although some time had passed, the statements were excited utterances and were properly admitted.<sup>203</sup>

Williams further questioned the statements because they were made in response to questions posed by the police officer and the victim's wife. However, the court noted that statements made in response to inquiries are not

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196. *Id.* at 1138-39.

197. 776 N.E.2d 1219 (Ind. Ct. App. 2002).

198. *Id.* at 1221-22.

199. *Id.* at 1222.

200. 782 N.E.2d 1039 (Ind. Ct. App. 2003).

201. *Id.* at 1046.

202. *Id.* Rule 803(2) provides that statements are not precluded as hearsay if they are statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." IND. R. EVID. 803(2).

203. *Williams*, 782 N.E.2d at 1046 (citing *Yamobi v. State*, 672 N.E.2d 1344, 1347 (Ind. 1996)).



inherently unreliable.<sup>204</sup> Because the victim was still under the excitement of being shot, the statements were excited utterances.<sup>205</sup>

#### *F. Child Welfare Worker's Notes as Business Records*

In *In Re Termination of Parent-Child Relationship of E.T and B.T.*,<sup>206</sup> the Taylor family had their children permanently removed from their care, based in part on the contents of regular home-visit reports submitted by case workers as part of their in-home visitations. These reports are made in the regular course of the visits, based on first-hand observations. The reports are routinely submitted and initialed by a supervisor and then submitted to the county Office of Family and Children.<sup>207</sup>

The Taylors argued that these records were hearsay and should not have been admitted under the Business Records exception because they were more like investigative police reports than business records.<sup>208</sup> The court disagreed and found that the business records exception to the hearsay rule did apply.<sup>209</sup> The court noted that the records contain firsthand impressions of events which they had a duty to observe and a duty to report, the reports were made contemporaneously or soon after the events took place, and the records were kept in the regular course of business.<sup>210</sup> While the court did find this type of record admissible under Rule 803(6), it noted its preference that case workers be called as witnesses, rather than relying on their written reports to permanently terminate a parent-child relationship.<sup>211</sup>

#### *G. The Agent as Custodian of Business Records*

In *J.L. v. State*,<sup>212</sup> a juvenile appealed his adjudication as a juvenile

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204. *Id.*

205. *Id.*

206. 787 N.E.2d 483 (In. Ct. App. 2003).

207. *Id.* at 485.

208. *Id.* at 486. Rule 803(6) provides that a

memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as used in this Rule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

IND. R. EVID. 803(6).

209. 787 N.E.2d at 486.

210. *Id.*

211. *Id.* at 486-87.

212. 789 N.E.2d 961 (Ind. Ct. App. 2003).

delinquent. In part, he argued that attendance records had been improperly admitted under the business records rule because the witness who testified regarding the records admitted she was not the actual custodian of the records and that she did not work at the school that J.L. sometimes attended.<sup>213</sup>

The court noted that Rule 803(6) permits the proponent of an exhibit to be the custodian of the records or another qualified witness, and "the proponent of an exhibit may authenticate it by calling a witness who has a functional understanding of the record keeping process of the business with respect to the specific entry, transaction or declaration contained in the document."<sup>214</sup> The witness was an appointed attendance officer for the school system and demonstrated her understanding of the school system's record-keeping process, and even though she did not have physical custody of the original records, she qualified as an "other qualified witness."<sup>215</sup> The court ruled that the records had been properly admitted under the business records exception to the hearsay rule.<sup>216</sup>

#### *H. Unavailable May Mean More Than a Vacation*

In *Garner v. State*,<sup>217</sup> Garner appealed his convictions for child molestation, in part because the State had been allowed to introduce prior videotaped statements of two witnesses after declaring the witnesses "unavailable." Garner claimed that this violated his right of confrontation under the U.S. and Indiana Constitutions.<sup>218</sup>

The State claimed the witnesses were unavailable and that their testimony was properly admitted under Rule 804, which contains several hearsay exceptions if the witness is unavailable, including an exception allowing former testimony.<sup>219</sup> Although the court found that the deposition was sufficiently reliable because the defendant and his lawyer had aggressively cross-examined the witnesses, the issue of whether the witnesses were truly "unavailable" as contemplated by Rule 804 remained.<sup>220</sup> The court noted that it had previously determined that a witness going on vacation was an acceptable excuse for using deposition testimony.<sup>221</sup> However, the issue of right-of-confrontation was not raised in the previous case law associated with this issue.<sup>222</sup>

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213. *Id.* at 963.

214. *Id.* at 964 (citing *Shepherd v. State*, 690 N.E.2d 318, 329 (Ind. Ct. App. 1997)).

215. *Id.*

216. *Id.*

217. 777 N.E.2d 721 (Ind. 2002).

218. *Id.* at 723-24.

219. *Id.* at 724. Rule 804 defines unavailability as including: "situations in which the declarant . . . (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process or other reasonable means. IND. R. EVID. 804(a).

220. *Id.*

221. *Id.* at 725 n.7 (citing *Kidd v. State*, 738 N.E.2d 1039, 1042-43 (Ind. 2000)).

222. *Id.* at 725.



In this case, Garner had offered to hear other issues to allow time for the witnesses to return and the State refused. The court thus held that “a mere vacation is not sufficient to circumvent the right of confrontation.”<sup>223</sup> The court noted that as long as the vacation is not “of such a length as to circumvent the defendant’s right to a speedy trial and grind the wheels of justice to a halt, a postponement of the proceedings would have constituted a good faith effort to procure attendance.”<sup>224</sup>

### *I. Self-Deposition when Incarcerated*

In *Tillotson v. Clay County Department of Family and Children*,<sup>225</sup> parents of a child were convicted of felony neglect and incarcerated. Eight months later, the parents filed a motion to transport to be present at the parental termination proceedings.<sup>226</sup> The parents took no further action until the second day of proceedings, when they requested permission to attend by phone, which was also denied.<sup>227</sup>

The court noted that the parents never requested a hearing in their motions to transport and did not suggest an alternate means of communication until the second day of the hearing. In considering the risk created by not allowing the parents to participate, the court noted that the parents had been represented by counsel and given every opportunity to cross-examine witnesses. Furthermore, as unavailable witnesses, the parents could have deposed themselves and entered their testimony into evidence at the hearing pursuant to Rule 804(b)(1).<sup>228</sup> The court did state that this is not the equivalent of allowing testimony at trial and cautioned that “in future cases, trial courts would be well advised to fully consider alternative procedures by which an incarcerated parent could meaningfully participate in the termination hearing when the parent cannot be physically present.”<sup>229</sup>

### *J. Incompetent at Trial but Prior Testimony Admitted*

In *Carpenter v. State*,<sup>230</sup> Carpenter appealed his convictions for child

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223. *Id.*

224. *Id.*

225. 777 N.E.2d 741 (Ind. Ct. App. 2002).

226. *Id.* at 742.

227. *Id.* at 743.

228. *Id.* at 746. Rule 804(b)(1) provides that

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

IND. R. EVID. 804(b)(1).

229. *Tillotson*, 777 N.E.2d at 746.

230. 786 N.E.2d 696 (Ind. 2003).

molestation. While the child victim had been found incompetent to testify at trial, the trial court allowed a videotaped interview to be admitted as well as the victim's statements made to her mother and grandfather. The video interview and the statements had been made shortly after the incident occurred.

The trial court had allowed these items to be admitted, even though the child had been found incompetent as a witness for failure to demonstrate knowledge of the difference between the truth and a lie in the Child Hearsay Hearing.<sup>231</sup> This evidence was admitted pursuant to the "protected person statute," which in relevant part provides that the statements and videotape of a child or disabled person that are not otherwise admissible can be found admissible if "(1) the trial court found, in a hearing attended by the child, that the time, content, and circumstances of the statement or videotape provided sufficient indications of reliability and (2) the child was available for cross-examination at the hearing."<sup>232</sup>

The court found that the testimony from the family members and the video interview lacked sufficient reliability as to the protected persons statute because there was no indication that the statements were made close in time to the incident, the statements were not sufficiently close in time to each other to preclude implantation or cleansing, and the child was unable to distinguish between truth and falsity. The court found that, without the improperly admitted evidence, there was not sufficient evidence to uphold the conviction and remanded the case for a new trial.<sup>233</sup>

The court noted that

while it is certainly true that the protected person statute provides that a statement or videotape made by a child incapable of understanding the nature and obligation of an oath is nevertheless admissible if the statute's requirements are met, there is a degree of logical inconsistency in deeming reliable the statements of a person who cannot distinguish truth from falsehood.<sup>234</sup>

## X. PRODUCTION OF ORIGINAL EVIDENCE

### A. Computer-Generated Evidence

In *Sutherlin v. State*,<sup>235</sup> Sutherlin appealed his conviction for robbery. Sutherlin had been identified by the victim from a computer-generated photo array. At trial, the State was unable to produce the actual array that the victim had viewed and instead submitted a second computer-generated array using the same six photographs as the original.

Sutherlin argued that this evidence should not have been allowed because

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231. *Id.* at 701-04.

232. *Id.* at 699 (citing IND. CODE § 35-37-4-6).

233. *Id.* at 704.

234. *Id.*

235. 784 N.E.2d 971 (Ind. Ct. App. 2003).



Rule 1002 provides that “to prove the content of a writing, recording, or photograph, the original . . . is required, except as otherwise provided in these rules or by statute.”<sup>236</sup> The court disagreed, observing that Rule 1001(3) provides that if “data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately is an ‘original.’”<sup>237</sup> The court determined that the trial court had not abused its discretion in admitting the second array because the second array accurately reflected the original data.<sup>238</sup>

### *B. Witness Testimony Regarding Movie Scene*

In *Jones v. State*,<sup>239</sup> a police detective testified at trial about how a scene from the movie *Curdled* was strikingly similar to the murder that Jones had been charged with. The detective also testified that Jones had a movie poster for *Curdled* in his living room, and a video store owner testified that her records showed that Jones had rented this movie approximately one week prior to the murder.

Jones argued on appeal that it was error under Rule 1002 to allow the detective to testify regarding the contents of the movie scene rather than showing the scene directly to the jury.<sup>240</sup> However, Jones did not challenge the accuracy of the detective’s description of the scene either at trial or on appeal. The court noted that for reversal due to improper use of secondary evidence the objection must identify an actual dispute over the accuracy of the secondary evidence.<sup>241</sup> Because there was no dispute over the detective’s description of the scene, any error was harmless.<sup>242</sup>

## XI. COMMON LAW SURVIVING THE ADOPTION OF THE RULES

In *Kien v. State*,<sup>243</sup> Kien appealed his convictions in part based on a contention that the State had impeached him on collateral matters. At trial, the State had asked Kien if he had ever been suicidal, and Kien answered that he had not. The State made no attempt to link this mental state to the crime charged, child molestation, but offered into evidence two suicide notes written by Kien.

The court pointed out that, because the State had made no attempt to link Kien’s mental state to the crimes, this was impeachment on a collateral issue. The court reiterated the supreme court’s holding in *Jackson v. State* that the common law rule preventing impeachment on collateral matters was still valid

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236. *Id.* at 973 (quoting IND. R. EVID. 1002).

237. *Id.* (quoting IND. R. EVID. 1001(3)).

238. *Id.*

239. 780 N.E.2d 373 (Ind. 2002).

240. *Id.* at 378.

241. *Id.*

242. *Id.*

243. 782 N.E.2d 398 (Ind. Ct. App. 2003).

after the adoption of the Indiana Rules of Evidence.<sup>244</sup> Because it was a collateral matter, once Kien testified that he had not been suicidal, the State was bound by that answer, unless it could present evidence that was independently admissible for some reason other than solely to discredit the witness.<sup>245</sup>

In *Finney v. State*,<sup>246</sup> Finney appealed his conviction for resisting (fleeing) law enforcement. A state trooper had attempted to stop Finney on a traffic violation, and Finney fled. After Finney escaped, the State filed charges against him. Finney's Sixth Amendment right to counsel attached upon the filing of charges. Finney eventually turned himself in, and prior to receiving access to counsel, the trooper asked him why he fled. Finney answered that "it was a dumb mistake or a stupid mistake."<sup>247</sup> The trooper was allowed to testify regarding this statement at trial, and the court denied Finney's motion to strike the testimony.<sup>248</sup>

Because Finney's counsel did not immediately object to the trooper's testimony, but only moved to strike the testimony shortly thereafter, case law prior to adoption of the Rules would have held that the objection was waived.<sup>249</sup> The court noted that Rule 103(a) allows preservation of claims of errors when "a timely objection or motion to strike appears of record . . . ."<sup>250</sup> Finney's counsel had also claimed to be unaware of the statement until after the testimony had been given, and the court further noted that there was a common law exception to the waiver rule for failure to object where the objectionable answer could not have been anticipated.<sup>251</sup>

The court decided that the trial court had abused its discretion by not striking the trooper's testimony regarding Finney's statement. However, it did so based on the presence of other, overwhelming evidence of Finney's guilt. The court said that although

the facts here lead us to the conclusion that in this particular instance the conviction will be upheld, we think it appropriate to clearly and plainly say to all arms of law enforcement that a defendant's Sixth Amendment right to counsel, which had plainly attached in this case, is an important and inviolable right . . . . Absent other overwhelming evidence of Finney's guilt, we would not have hesitated to reverse this conviction.<sup>252</sup>

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244. *Id.* at 409 (citing *Jackson v. State*, 728 N.E.2d 147, 153 (Ind. 2000)).

245. *Id.* (citing *Highley v. State*, 535 N.E.2d 1241, 1243 (Ind. Ct. App. 1989)).

246. 786 N.E.2d 764 (Ind. Ct. App. 2003).

247. *Id.* at 766.

248. *Id.*

249. *Id.* (citing *N. Ind. Pub. Serv. Co. v. Otis*, 250 N.E.2d 378, 406 (Ind. App. 1969) (holding that a "party who is not examining a witness cannot use a motion to strike as a means of objection to a question after it has been answered")).

250. *Id.* (quoting IND. R. EVID. 103(a)).

251. *Id.* (citing *Wagner v. State*, 474 N.E.2d 476, 491-92 (Ind. 1985)).

252. *Id.* at 769.



In *Aldridge v. State*,<sup>253</sup> Aldridge appealed his conviction for child molesting. At trial, a six-year old and the five-year old victim had been allowed to testify. Aldridge argued that neither witness was competent to testify due to the ages of the children at the time of trial. Formerly, a child under ten years old was presumed incompetent to testify. The statute creating this limitation was repealed in 1990.<sup>254</sup>

In place of the repealed statute, Rule 601 now applies: "every person competent to be a witness except as otherwise provided in these rules or by act of the Indiana General Assembly."<sup>255</sup> The court noted that it had previously held that Rule 601's failure to exclude children did not prevent inquiry into competency where raised by the defendant,<sup>256</sup> and when read with the repeal of the prior statute, the rule assumed competency until otherwise demonstrated.<sup>257</sup>

In a footnote, however, the court noted decisions holding that trial courts are required to conduct their own inquiry,<sup>258</sup> that the enactment of Indiana Evidence Rule 601 did not affect previous Indiana decisions regarding the competence of children to testify,<sup>259</sup> and holding that Rule 601 requires a trial court to make an inquiry into competency of a child witness.<sup>260</sup>

In the present case, the court held that Aldridge had not demonstrated that the victim had been incompetent to testify. The trial court had conducted extensive questioning of the witnesses regarding truth, falsity, and the differences between right and wrong. The conviction was affirmed.<sup>261</sup>

#### CONCLUSION

The Indiana Rules of Evidence have now been in force for a full decade. While the cases discussed above represent only a small fraction of the cases decided each year involving Evidence questions, they demonstrate that even after ten years of interpretation much remains open to debate.

Differences between the Indiana Rules of Evidence and their federal counterparts, statutory changes, and judicial decisions must all be considered in order to understand how the Rules apply in any given situation. Students of the Indiana Rules are likely to be provided with ample new material as the Rules continue to develop over their second decade of post-adoption development.

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253. 779 N.E.2d 607 (Ind. Ct. App. 2002).

254. *Id.* at 609.

255. *Id.* (quoting IND. R. EVID. 601).

256. *Id.* (quoting *Burrell v. State*, 701 N.E.2d 582, 585 (Ind. Ct. App. 1998)).

257. *Id.* (citing *Newsome v. State*, 686 N.E.2d 868, 877-78 (Ind. Ct. App. 1997)).

258. *Id.* at 609 n.1 (citing *Haycraft v. State*, 760 N.E.2d 203, 209 (Ind. Ct. App. 2001)).

259. *Id.* (citing *Harrington v. State*, 755 N.E.2d 1176, 1181 (Ind. Ct. App. 2001)).

260. *Id.* (citing *Newsome v. State*, 686 N.E.2d 868, 872 (Ind. Ct. App. 1997)).

261. *Id.* at 610.





# SURVEY OF DEVELOPMENTS IN INDIANA FAMILY LAW

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## INTRODUCTION

The reach of our state law involving the formation, regulation and dissolution of family rights and responsibilities, as well as the support, care and protection of children is vast.<sup>1</sup> Given the breadth of the subject, the scope of this article is primarily limited to developments in the case law, court rules and statutes pertaining to the traditional family law areas of dissolution of marriage, paternity, child custody and support, and adoption. Additionally, decisions during the survey period involving cohabitation and adoption by unmarried same-gender parents are discussed in light of the timeliness of these topics.

### I. DISSOLUTION OF MARRIAGE

During the current survey period, as in past periods, our appellate courts decided an abundance of cases involving property distributions, spousal maintenance, settlement agreements and procedural matters. The cases discussed in this section represent developments of note regarding the law of property distribution.

#### *A. Property Distribution*

*1. Marital Asset Issues.*—The distribution of property in a dissolution action can be reduced primarily to three questions: Is it property and, if so, is it marital property? What is the value of the property? How should the property be divided?<sup>2</sup> Regarding the first question, it is well established in Indiana that,

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1. At least fifteen titles of the Indiana Code have statutes affecting Indiana families. Title 31 of the Code, alone, contains ten articles expressly identified as pertaining to "Family Law" which range from marriage to human reproduction. Eleven articles of Title 31 are specified as "Juvenile Law." See IND. CODE § 31-9-2-72 (1998) ("Juvenile law" refers to [Indiana Code section] 31-30 through 31-40."). An additional article of general provisions and an article containing 144 sections of definitions apply to the whole of Title 31. *Id.* Sprinkled throughout the other titles are provisions governing criminal offenses against children and the family, children's and family protection services, marriage and family therapists, and trust and fiduciaries, to name just some. Finally, the Indiana Supreme Court has promulgated child support rules and guidelines and parenting time guidelines which are presumptively applicable to every legal case involving child support or visitation in Indiana.

2. Michael G. Ruppert, *Survey of Recent Developments in Family Law*, 23 IND. L. REV. 363 (1990). See generally Robert J. Levy, *An Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147 (1989).

unless excluded by statute, case authority or prenuptial agreement, all assets acquired before or during the marriage are marital assets, regardless of which spouse acquired the property.<sup>3</sup> Two cases decided during the survey period, *Lawson v. Hayden*<sup>4</sup> and *Beckley v. Beckley*,<sup>5</sup> added to the lists of property rights that are included or excluded from marital property.

In *Lawson*, Husband was employed for a railroad covered by the Railroad Retirement Act. He became permanently disabled and began receiving, during the marriage, a Railroad Retirement annuity. The annuity was comprised of several components. By federal law, the Tier I component is non-divisible. The Tier II component is divisible by a state court.<sup>6</sup> The trial court found that the Tier II payments received prior to retirement age were occupational disability benefits and were includable in the marital estate.<sup>7</sup> However, the trial court awarded none of the disability benefits to Wife until Husband had attained retirement age.<sup>8</sup> On appeal, Wife contended that the trial court erred by not awarding her any portion of the annuity payment received before Husband's attainment of retirement age; she also contended that the trial court erred by awarding her less than half of the retirement benefit after Husband reached the age of retirement.<sup>9</sup>

*Lawson* presented the court of appeals with an opportunity to clarify a line of cases with different results about the includability of occupational disability benefits.<sup>10</sup> The *Lawson* court noted that our supreme court limited *Gnerlich* in its *Leisure* decision and held that worker's compensation benefits were not marital property subject to division because, first, the recipient did not pay anything during the marriage to obtain the state benefits against lost earnings and did not in any other way deplete marital assets; and, second, the worker's compensation benefit is intended to replace future wages that the recipient would

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3. Property for purposes of dissolution of marriage means all of the assets of either party or both parties including pension and retirement benefits. IND. CODE § 31-9-2-98 (1998). Thus, the court in a dissolution of marriage action divides all the property of the parties whether owned by either spouse before the marriage, acquired by the spouses in their own right during the marriage and before separation, or acquired by their joint efforts. *See id.* § 31-15-7-4. Property may be excluded from the marital estate by a valid premarital agreement. *See Huber v. Huber*, 586 N.E.2d 887 (Ind. Ct. App. 1992).

4. 786 N.E.2d 756 (Ind. Ct. App. 2003).

5. 790 N.E.2d 1033 (Ind. Ct. App. 2003).

6. *Lawson*, 786 N.E.2d at 758.

7. *Id.* at 761.

8. *Id.* at 759.

9. *Id.*

10. *Leisure v. Leisure*, 605 N.E.2d 755 (Ind. 1993) (limiting *Gnerlich* and holding that worker's compensation benefits are not marital property subject to division); *Jendreas v. Jendreas*, 664 N.E.2d 367 (Ind. Ct. App. 1996) (holding that a disability pension is not marital property subject to division); *Gnerlich v. Gnerlich*, 538 N.E.2d 285 (Ind. Ct. App. 1989) (finding that benefits from private disability insurance were marital property subject to division); *see also Antonacopulos v. Antonacopulos*, 753 N.E.2d 759 (Ind. Ct. App. 2001).



earn if he could work.<sup>11</sup> Further, the *Leisure* court noted that worker's compensation benefits differ from a pension in that a pension amounts to deferred compensation for current employment, while worker's compensation amounts to compensation for decreased working capacity as the result of a work-related injury; once the former is vested it cannot be taken away, while the later is contingent upon continued disability.<sup>12</sup> It is well established in Indiana that future income is not divisible.<sup>13</sup> Yet, *Gnerlich*'s disability insurance benefits were held to be marital property, while the benefits in *Leisure*, *Jandreass*, and *Antonacopulos* were not. The distinction is that in *Gnerlich* the disabled spouse paid for the disability insurance benefits by contributions he had made during the marriage to a disability retirement plan.<sup>14</sup> The *Lawson* court reasoned that the Husband's annuity before retirement clearly represented payment for loss of future income, which favors exclusion as a marital asset; but, it noted that Husband's payroll taxes were credited to trust funds from which the annuities were paid, which favors inclusion as a marital asset.<sup>15</sup> Neither factor—replacement of future earnings or lack of marital contribution—appeared dispositive to the court. Instead, it concluded that in order to exclude occupational disability benefits from the marital estate, both must be present.

We discern nothing in the analyses of *Antonacopulos*, *Jendreas*, and *Gnerlich* conveying the idea that either factor is dispositive, or indeed even more important than the other. Instead, it seems to us that both are cited as being integral to the determination that disability benefits are not marital property. For this reason, we view the two elements in the conjunctive. That is, *both* must be present in order for the particular disability benefit in question to be excluded as marital property and thus not subject to division.<sup>16</sup>

Stated conversely, it seems that includability of the disability benefit centers upon whether contributions were made to it during the marriage or marital assets were depleted to obtain it.<sup>17</sup>

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11. *Lawson*, 786 N.E.2d at 761.

12. *Id.* (citing *Leisure*, 605 N.E.2d at 759).

13. *Gnerlich*, 538 N.E.2d at 286 (citing *Wilcox v. Wilcox*, 365 N.E.2d 792, 795 (Ind. App. 1977)).

14. *Id.*

15. *Lawson*, 786 N.E.2d at 762.

16. *Id.*

17. It is speculated in a prior edition of this review that the outcome found in *Lawson v. Hayden* was inevitable:

Resting the outcome in disability benefit cases on whether the trial court finds the benefit to be deferred compensation or replacement of future wages, as the *Jendreas* court does in part, must ultimately fail. These cases seem to show that the distinction between being in or out of the pot depends upon whether an actual contribution from a marital asset can be shown for acquiring the disability benefit.

Paula J. Schaefer & Michael G. Ruppert, *Survey of Indiana Family Law in 1996*, 30 IND. L. REV.

*Beckley v. Beckley*,<sup>18</sup> at first blush, seems to run counter to *Lawson* because it held that a portion of benefits under the Federal Employer's Liability Act (FELA) were included in the marital pot, despite the fact that the benefits were clearly intended to compensate for future lost wages and the recipient spouse contributed nothing to their acquisition nor depleted any marital assets to obtain them. Instead, the former husband, who was permanently disabled during the course of his employment with a railroad covered under the FELA, accepted a lump-sum settlement with the FELA wherein he received \$175,000 after expenses and attorney's fees during the marriage. Part of the proceeds were used to reduce the parties' mortgage, to pay off the Wife's car, and to pay for personal items. A few months after Husband received the settlement, Wife filed her petition for dissolution of marriage. At that time, approximately \$96,000 of the settlement was left.<sup>19</sup> At trial, Husband argued that the FELA settlement, like a worker's compensation award, was compensation in lieu of future income and not marital property subject to division. The trial court, however, decided that the FELA settlement was included in the marital estate and awarded Husband sixty-nine percent of the marital estate and Wife thirty-one percent of the marital estate.<sup>20</sup> Wife appealed her distribution. The Husband cross-appealed, contending that the trial court erroneously included the lump sum settlement received pursuant to FELA in the marital estate. On appeal, the court of appeals noted that the initial inquiry—whether settlement proceeds under FELA should be included in the marital estate—was one of first impression in Indiana.<sup>21</sup> Observing that other states have included, excluded, and devised hybrid approaches, the court once again returned to *Leisure v. Leisure*<sup>22</sup> for instruction. In *Leisure*, the supreme court reversed the lower courts' decisions, which included in the marital pot a worker's compensation lump-sum payment received by the husband during the marriage and periodic payments after the marriage, reasoning that it is generally accepted that worker's compensation is awarded in lieu of lost wages and not as damages for pain, suffering and monetary loss.<sup>23</sup> However, the *Beckley* court noted that the *Leisure* court qualified its own holding, stating that "[t]he worker's compensation benefits received during the marriage to replace earnings of *that period* are a marital asset subject to distribution, but to the extent the worker's compensation benefits replace earnings after dissolution, the benefits remain separate property."<sup>24</sup> *Beckley* remanded, holding:

Thus, we must reverse the trial court's order and remand this cause to the

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1073, 1076 (1997).

18. 790 N.E.2d 1033, 1037 (Ind. Ct. App.), *vacated by* 804 N.E.2d 757 (Ind. 2003).

19. *Id.*

20. *Id.* at 1035.

21. *Id.*

22. 605 N.E.2d 755 (Ind. 1993).

23. *Beckley*, 790 N.E.2d at 1036 (citing *Leisure*, 605 N.E.2d at 759).

24. *Id.* at 1037 (quoting *Leisure*, 605 N.E.2d at 759).



trial court so that it may re-divide the marital estate pursuant to the rule announced in *Leisure*. To be sure, a small portion of the FELA settlement will be a part of the marital estate inasmuch as [Wife] filed for dissolution four months after [Husband] received the award. As a result, part of the FELA proceeds attributable to these four months should be included in the marital pot.<sup>25</sup>

2. *Valuation Issues*.—*Bass v. Bass*<sup>26</sup> shows a trial court correctly and incorrectly adjusting an expert appraisal of real estate. When the trial court calculated the equity in the marital residence, it subtracted from the appraisal value the cost of estimated roof repairs and other repairs needed for the house to achieve the appraisal value.<sup>27</sup> A roofer testified to the amount he would charge to do the roof repairs, and Wife testified generally to the amount necessary for the other “necessary repairs.” She testified that she was guessing as to the estimate, and no other evidence was admitted showing the cost.<sup>28</sup> The trial court subtracted the expert roofer’s estimate and Wife’s unsupported estimate. On appeal, the court of appeals upheld the deduction for the roofer’s estimate but found the evidence insufficient to support the trial court’s finding that the appraised value should be further reduced for the amount that Wife guessed was necessary for other “necessary repairs.”<sup>29</sup>

*Case v. Case*<sup>30</sup> involves a post-decree loss of value of an asset between the time that the court entered its decree and the actual distribution of the asset. Specifically, Husband’s 401(k) plan was worth approximately \$90,000 a few days before trial.<sup>31</sup> The court awarded Wife a \$50,000 sum out of the 401(k) and awarded Husband the remaining sum of the 401(k).<sup>32</sup> Wife’s counsel prepared the decree for the court’s signature. The decree was actually issued approximately a month and a half after the final hearing date. Before effectuation of the distribution of the 401(k) could occur, Husband filed a motion to modify the decree because the 401(k) had lost approximately \$23,000 in value since the final hearing purely as the result of market forces.<sup>33</sup> The trial court held a hearing on the motion and concluded that it would be unfair for Husband to

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25. *Id.*

26. 779 N.E.2d 582 (Ind. Ct. App. 2002).

27. *Id.* at 587.

28. *Id.* at 588-89.

29. *Id.* at 589.

30. 794 N.E.2d 514 (Ind. Ct. App. 2003).

31. *Id.* at 515.

32. *Id.* at 516.

33. *Id.* at 515. Trial courts are given broad discretion in selecting the valuation date for a marital asset. See *Quillen v. Quillen*, 671 N.E.2d 98, 103 (Ind. 1996). As noted in *Quillen*, the selection of the valuation date for any particular asset has the effect of allocating the risk of change in the value of that asset between the date of valuation and the date of the hearing. See also *Reese v. Reese*, 671 N.E.2d 187 (Ind. Ct. App. 1996). The *Bass* case deals with a post-decree change in value, before actual distribution of the asset.

exclusively bear the downside risk of the securities market. Accordingly, the trial court determined the parties' original percentages of its distribution and entered an order awarding the parties those percentages of the devalued asset.<sup>34</sup>

Wife first attacked the trial court's order on procedural grounds, contending that Husband should have filed a motion to correct error since modification of a property distribution was improper under the controlling statute.<sup>35</sup> Wife's second challenge to the trial court's ruling was that it abused its discretion even if analyzed under Trial Rule 60 because its original order specifically awarded her a set sum, \$50,000, and did not specify any terms regarding growth or losses.<sup>36</sup> Wife seemed to ignore that the trial court also awarded Husband a set amount.<sup>37</sup> The appellate court noted that a similar situation had occurred in *Niccum v. Niccum*.<sup>38</sup> The court in *Case* noted that Wife conceded that there were no express terms regarding growth or losses in the decree. Accordingly, it held:

Here, as in *Niccum*, we hold that absent express language stating otherwise, the decree implicitly contemplated that both parties would share in the risks and rewards associated with the investment plan. Thus, it was not the trial court's intent to award [Wife] \$50,000 regardless of the value of the 401(k) plan. Rather, the parties were each awarded a percentage of the plan, of which [Wife's] share is slightly greater than [Husband's] share. Ultimately, the trial court did not modify the original decree as much as the trial court clarified the decree to reflect its original meaning. Therefore, we hold that the trial court did not abuse its discretion when it granted relief from the decree to ensure that both . . .

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34. *Case*, 794 N.E.2d at 516.

35. *Id.*

First, we agree that a petition to modify the dissolution decree was not the correct title. Indiana Code section 31-15-7-9.1 provides, in relevant part, that "orders concerning property disposition entered under this chapter may not be revoked or modified, except in case of fraud." Because [Husband] does not allege fraud, a petition to modify was inapposite.

*Id.* The court went on to state that even though Husband's motion could not be characterized as a motion to correct error pursuant to Indiana Trial Rule 59(A)(1) because it was not filed within thirty days of the final judgment, his motion to modify could be treated as a motion for relief from judgment under Indiana Trial Rule 60(B). *Id.* at 517.

36. *Id.*

37. *Id.* at 518.

38. 734 N.E.2d 637 (Ind. Ct. App. 2000). In *Niccum* the parties entered into a settlement agreement which divided a retirement savings and investment program between the parties. The agreement apparently did not allocate the rewards of growth or the risk of loss involved in the investment plan. The trial court ultimately ordered that Wife would receive growth in the investment attributed to her share of the program, and Husband appealed. On appeal, the court held that "absent express language stating otherwise, the settlement agreement of the parties implicitly contemplated both parties sharing all of the rewards and risks associated with an investment plan." *Id.* at 640.



would bear the risk of the securities market.<sup>39</sup>

3. *Distribution Issues.*—*Hendricks v. Hendricks*<sup>40</sup> adds a new twist to the factors affecting distribution.<sup>41</sup> It has long been held that the trial court does not abuse its discretion if it considers evidence of a party's contribution during the parties' pre-marital cohabitation when dividing the marital pot.<sup>42</sup> In *Hendricks*, the parties lived together more than three years prior to their marriage, which lasted approximately ten years. Husband was employed by General Motors Corporation ("GM") approximately thirty-one years before retiring. Thus, Husband was employed at GM throughout the more than three years of cohabitation and approximately six-and-one-half years of the parties' ten years of marriage. Husband complained that the trial court erroneously included the parties' period of cohabitation in its division of his pension between the parties.<sup>43</sup> The trial court distributed the pension between the parties by applying the "coverture fraction" to the pension to arrive at "the marital portion of the pension," which it divided roughly in half.<sup>44</sup> Thus, Husband was complaining

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39. *Case*, 794 N.E.2d at 519.

40. 784 N.E.2d 1024 (Ind. Ct. App. 2003).

41. Indiana Code section 31-15-7-5 mandates that the trial court presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

- (1) The contribution of each spouse to the acquisition of the property, regardless whether the contribution was income producing.
- (2) The extent to which the property was acquired by each spouse;
  - (A) before the marriage; or
  - (B) though inheritance or gift.
- (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.
- (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
- (5) The earning or earning ability of the parties as related to:
  - (A) a final division of property; and,
  - (B) a final determination of the property rights of the parties.

IND. CODE § 31-15-7-5 (1998).

42. *Chestnut v. Chestnut*, 499 N.E.2d 783, 786 (Ind. Ct. App. 1986).

43. *Hendricks*, 784 N.E.2d at 1026.

44. *Id.* at 1026. While *Hendricks* speaks in terms of the sum derived by applying the coverture fraction to the pension as the "marital portion of the pension", *id.*, it should be noted that, without a prenuptial agreement, *all of the pension is in the marital pot*. *Huber v. Huber*, 586 N.E.2d 887, 889 (Ind. Ct. App. 1992), *trans. denied*. The "coverture fraction" is just one

that, by including the period of cohabitation in the coverture fraction, Wife received more than her entitlement of his pension. In support of his contention, Husband noted that he and Wife only lived together "on and off" during their cohabitation. Wife, on the other hand, presented evidence indicating that during the period of cohabitation she worked, paid joint expenses and helped Husband start a business. Viewing Husband's contention as a request to re-weigh the evidence, the appellate court held that the trial court did not abuse its discretion when it considered Wife's contributions during the parties' period of cohabitation and, more specifically, when the court included the period of pre-marital cohabitation in calculating the coverture ratio.<sup>45</sup> However, the case was reversed in part and remanded with instructions to make appropriate adjustments in the trial court's overall scheme to award Husband fifty-six percent of the marital pot and Wife forty-four percent of the marital pot because of errors in the trial court's mathematical calculations.<sup>46</sup>

### *B. Spousal Maintenance*

*Bass v. Bass* also involved Husband's contention upon appeal that the trial court caused him to improperly pay spousal maintenance in a bifurcated divorce proceeding by continuing its provisional order for spousal maintenance to Wife during the period of time between the dissolution of the parties' marriage and the final hearing pertaining to distribution of property.<sup>47</sup> Wife was granted in-kind temporary spousal maintenance in the form of mortgage and utility payments on the marital residence of which she had possession during the pendency of the parties' dissolution proceedings. Additionally, Husband was ordered to pay her auto loan payments and automobile insurance. The parties had a prenuptial agreement which did not exclude Wife's right to the provision of spousal support during the pendency of the dissolution action, but it did exclude her right to receive such maintenance after the granting of a dissolution petition.<sup>48</sup> At Husband's request, the court bifurcated the proceeding, divorced the parties, set a final hearing for property distribution, and ordered that all preliminary orders

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methodology that the court can use for division of a pension. *Hendricks*, 784 N.E.2d at 1026 (citing *In Re Marriage of Preston*, 704 N.E.2d 1093, 1098 n.6 (Ind. Ct. App. 1999)).

The "coverture fraction" formula is one method a trial court may use to distribute pension or retirement plan benefits to the earning and non-earning spouses. Under this methodology, the value of the retirement plan is multiplied by a fraction, the numerator of which is the period of time during which the marriage existed (while pension rights were accruing) and the denominator is the total period of time during which pension rights accrued.

*Id.* (citing *Tirmenstein v. Tirmenstein*, 539 N.E.2d 990, 991 (Ind. Ct. App. 1989)).

45. *Hendricks*, 784 N.E.2d at 1026.

46. *Id.* at 1028.

47. 779 N.E.2d 582, 591-92 (Ind. Ct. App. 2002).

48. *Id.* at 587.



would remain in full force and effect.<sup>49</sup> On appeal, Husband argued that since the marriage was dissolved on December 11, 2000, albeit the final decree did not come out until May 7, 2001, the payments made during the interim constituted an improper award of maintenance.<sup>50</sup> On appeal, the court noted:

“Bifurcation is a process created by statute that allows a trial judge to complete a dissolution in two separate phases.” *Beard v. Beard*, 758 N.E.2d 1019, 1023 (Ind. Ct. App. 2001), *trans. denied*. A dissolution action is not complete until the second phase is finished and a final decree is entered. *Id.* With regard to orders entered while the dissolution is pending, Indiana Code 31-15-4-14 provides that “[a] provisional order terminates when: (1) the final decree is entered subject to right of appeal.” [IND. CODE] § 31-15-4-14 (1998).<sup>51</sup>

Simply put, the court of appeals found that the prenuptial agreement did not preclude preliminary spousal maintenance, that a provisional order does not terminate until a final decree is entered, and that the dissolution of marriage action does not constitute a final order until the second phase of the bifurcated proceeding is complete and a final decree entered.<sup>52</sup>

*Brown v. The Guardianship of Brown*,<sup>53</sup> involves spousal support but not in the context of the dissolution of marriage. In this case, Mr. Brown’s sons, his only offspring, appealed the trial court’s order requiring Mr. Brown’s guardianship to make a lump-sum support payment to Mrs. Brown’s guardianship after Mr. Brown died. Mrs. Brown was Mr. Brown’s childless, second spouse.<sup>54</sup> Mr. Brown died testate, leaving one-third of his personal estate and a life estate in one-third of his real property to Wife. All of the rest was left to his sons. Prior to his death, Mr. Brown’s guardianship estate had been ordered to make support payments to Mrs. Brown’s guardianship estate.<sup>55</sup> At the hearing before the trial court, the sons sought to eliminate the obligation of their father’s guardianship to make support payments to Wife’s guardianship. Wife’s guardianship sought an order for a lump-sum support payment based upon multiplying her life expectancy by the amount of the monthly support payment and then reducing that sum to its present value.<sup>56</sup> The trial court agreed with Mrs. Brown’s guardian and ordered a lump-sum support payment of more than \$160,000 from the guardianship estate of Mr. Brown.<sup>57</sup> The trial court’s order had the obvious effect of decreasing the sons’ inheritance and increasing the amount that Wife received from her deceased husband’s estate. On appeal, the

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49. *Id.* at 592.

50. *Id.* at 591-92.

51. *Id.*

52. *Id.*

53. 775 N.E.2d 1164 (Ind. Ct. App. 2002).

54. *Id.*

55. *Id.* at 1165.

56. *Id.* at 1165-66.

57. *Id.* at 1165.

sons presented a pure question of law: whether Husband's statutory and common law duty to support Wife ends at his death.<sup>58</sup> Reviewing the question of law under a *de novo* standard, the court of appeals held:

It is clear that the original support order entered prior to [Mr. Brown's] death established a monthly periodic allowance, akin to spousal maintenance in dissolution actions or child support. A review of our common-law treatment of spousal maintenance and child support leads us to the conclusion that [Husband's] obligation to pay periodic support to [Wife] ceased upon his death.

In *Hicks v. Fielman*, 421 N.E.2d 716 (Ind. Ct. App. 1981), we held, "[u]nless an agreement or decree calling for maintenance clearly says otherwise, maintenance payments can not accrue after the death of the person liable for them." *Id.* at 720. We concluded that the appellant's claim for maintenance after the death of her former husband could not as a matter of law succeed because the decree awarding such maintenance did not provide that the payments would continue after the death of the payor.<sup>59</sup>

The court further noted that the same rule was once true with respect to child support until the enactment of section 31-16-6-7 of the Indiana Code.<sup>60</sup> The guardian over Mrs. Brown's estate urged that the philosophy of the statutory rule extending child support after the payor's death should be extended to spousal support. Noting that the argument would be better presented to the legislature, the court explained its rationale:

Moreover, we observe that there is a critical distinction between the need for continuation of spousal support payments and the need for continuation of child support payments when inheritance law is considered. Specifically, a divorced parent is free to disinherit a child of his divorced marriage. See *Estate of Brummett by Brummett v. Brummett*, 472 N.E.2d [616,] 619 [(Ind. Ct. App. 1984)] ("the statutory provisions that extend support obligations beyond the death of the supporting parent are commonly enacted to soften the harsh result of disinheritance after divorce"). On the other hand, certain statutes protect

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58. *Id.* at 1166.

59. *Id.* (footnote omitted).

60. Section 31-16-6-7 of the Indiana Code provides:

(a) Unless otherwise agreed in writing or expressly provided in the order, provisions for child support are terminated:

(1) by the emancipation of the child; but

(2) not by the death of the parent obligated to pay the child support.

(b) If the parent obligated to pay support dies, the amount of support may be modified or revoked to the extent just and appropriate under the circumstances on petition of representatives of the parent's estate.

IND. CODE § 31-16-6-7 (1998).



a spouse from being disinherited by providing a spousal allowance and the ability to take against the will, thus ensuring a certain degree of future support.<sup>61</sup>

While living, spousal maintenance paid as the result of the incapacity of a spouse, however, can be turned on and off according to *McCormick v. McCormick*.<sup>62</sup> In *McCormick*, Wife was diagnosed with multiple sclerosis (MS) in 1979, during the parties' marriage. The marriage was dissolved in 1990, at which time Wife was not working due to the MS. She was awarded incapacity spousal maintenance in the amount of \$600 per month until such time as she received governmental disability benefits.<sup>63</sup> At that time, it was to be determined what amount of spousal maintenance, if any, Husband would continue to pay. The trial court's order for spousal maintenance was slightly modified on several occasions after the divorce, including once due to Wife obtaining part-time employment.<sup>64</sup>

In 1998, apparently as the result of receiving further education and improvements in treatments for MS, Wife began working full-time. In that employment, she was subject to layoffs. Husband sought to terminate or modify his maintenance obligation, and Wife acknowledged that her medical condition had somewhat improved since the divorce so that she could now work full-time.<sup>65</sup> However, she argued that she still had many physical limitations due to the MS and that her job prospects in the economy at large were very much limited due to those physical limitations. Husband testified that changes had occurred for him also. He recently retired from a job in which he earned nearly \$100,000 in 2000 and, at the time of the hearing, was earning approximately \$2200 per month in retirement income.<sup>66</sup> The trial court ordered that Husband should continue to pay the full spousal maintenance amount in those months when Wife was unable to work full time and a reduced amount in any month in which she did work full-time.<sup>67</sup> On appeal, the court acknowledged the broad discretion afforded a trial court to modify a spousal maintenance award<sup>68</sup> and stated,

[W]e find that the trial court abused its discretion in awarding maintenance during periods when Helen is working full time at the Census Bureau . . . .

We reject [Wife's] rationale that limited job opportunities necessarily amount to a material [effect] on an incapacitated spouse's self-supportive ability. Although these may go hand-in-hand, the essential

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61. *Brown*, 775 N.E.2d at 1167 (citations omitted).

62. 780 N.E.2d 1220 (Ind. Ct. App. 2003).

63. *Id.* at 1221.

64. *Id.*

65. *Id.* at 1221-22.

66. *Id.* at 1222.

67. *Id.* at 1223.

68. *Id.* at 1224.

inquiry is whether the incapacitated spouse has the ability to support himself or herself. . . . Therefore, we reverse the trial court's award of maintenance in the amount of \$300 per month when [Wife] is working full time at the Census Bureau.<sup>69</sup>

Turning to the portion of the judgment that ordered the continuation of maintenance when the former spouse was unable to work full time, the court stated,

We affirm the portion of the judgment that ordered continuation of maintenance when Helen is unable to work full time at the Census Bureau. The portion ordering maintenance, at a reduced amount, during periods of employment at the Census Bureau is reversed.

Contrary to [Husband's] assertions, it is irrelevant whether [Wife's] inability to work at the Census Bureau is based on her medical condition or being laid off. In either instance, the relevant inquiry is whether her ability to support herself through other employment is materially affected by her MS.<sup>70</sup>

## II. COHABITATION

The development of our case authority regarding cohabitation during this survey period has not been limited to whether pre-marital cohabitation can be considered as a factor in distributing assets. In *Putz v. Allie*<sup>71</sup> a former heterosexual couple entered into a "Settlement Agreement" upon the termination of eleven years of cohabitation. In the agreement, the parties recited that they had commingled funds, contributed financially and emotionally to the betterment of each other and that Ms. Allie had contributed time, effort and funds to the business, real estate, and assets of Mr. Putz. Accordingly, the agreement provided that Mr. Putz would pay Ms. Allie \$40,000 in installments over six years, pay her health insurance and car payments for one year, and pay off three charge accounts in her name. Mr. Putz made payments to Ms. Allie until someone told him that the agreement was unenforceable.<sup>72</sup> Consequently, Ms. Allie brought suit against Mr. Putz to enforce the agreement. Mr. Putz unsuccessfully moved for summary judgment, claiming that the agreement was against public policy. After a bench trial, the court entered judgment in favor of Ms. Allie for the balance of payments owed on the lump-sum, for pre-judgment interest, for the amount of several car payments, and the balances on the charge cards.<sup>73</sup> Putz appealed raising as issues for review whether the contract was an unenforceable palimony agreement and, alternatively, unenforceable as the result

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69. *Id.* at 1224-25 (footnote omitted).

70. *Id.* at 1225 & n.8.

71. 785 N.E.2d 577 (Ind. Ct. App. 2003).

72. *Id.* at 578.

73. *Id.* at 578-79.



of duress. Allie cross-claimed on appeal, ascertaining that the trial court erred by denying her attorney's fees.<sup>74</sup>

On appeal, Putz contended that the agreement was an unenforceable palimony agreement because there was no consideration for the agreement independent of the parties' relationship, which relationship is not recognized by law.<sup>75</sup> In response, the court returned to its early "palimony" case, *Glasgo v. Glasgo*.<sup>76</sup> In *Glasgo*, the former husband and subsequent cohabitant raised the same contention on appeal as in *Putz*, after a successful contractual action by his former spouse/cohabitant. He claimed that to permit an action based upon contract principles of unjust enrichment accomplishes indirect adjustment of common law marriage rights, which is prohibited in Indiana.<sup>77</sup> In particular, *Glasgo* had these prescient words:

Just as married partners are free to delineate in ante- or post-nuptial agreements the nature of their ownership in property, so should unmarried persons be free to do the same . . . . Recovery would be based only upon legally viable contractual and/or equitable grounds which the parties could establish according to their own particular circumstances.

While we do not subscribe to the theory that cohabitation automatically gives rise to the presumed intention of shared property rights between the parties, we find in this case that it would be unjust for Laurel to assert in one breath that Jane can in no way be presumed to be his wife for purposes of either the dissolution of marriage statutes or the concept of putative spouse and to assert in another the presumption that she rendered her services voluntarily and gratuitously.<sup>78</sup>

The *Putz* court then went to the next case in this line of cohabitation of authority and noted:

Subsequently, in *Bright v. Kuehl*, 650 N.E.2d 311 (Ind. Ct. App. 1995), this [c]ourt considered the property claim of a non-marital partner, and specifically determined "that a party who cohabitates with another without subsequent marriage is entitled to relief upon a showing of an express contract or a viable equitable theory such as an implied contract or unjust enrichment."<sup>79</sup>

The *Putz* court summed up its holdings:

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74. *Id.* at 579-82.

75. See IND. CODE § 31-11-8-5 (1998) ("A marriage is void if the marriage is a common law marriage that was entered into after January 1, 1958.").

76. 410 N.E.2d 1325 (Ind. Ct. App. 1980).

77. *Putz*, 785 N.E.2d at 579 (citing *Glasgo*, 410 N.E.2d at 1327-32).

78. *Glasgo*, 410 N.E.2d at 1332.

79. *Putz*, 785 N.E.2d at 580 (quoting *Bright v. Kuehl*, 650 N.E.2d 311, 315 (Ind. Ct. App. 1995)).

We agree with the trial court that the Agreement may be construed as an agreement fixing liquidated damages in lieu of an unjust enrichment claim by Allie. Allie testified, and Putz did not dispute, that Allie rendered services in Putz's jewelry store for three to five days per week, over a four or five year period of time, without receiving a paycheck, although household expenses were paid from the jewelry store receipts. Over an eleven-year period of time, Allie and Putz co-mingled funds, exerted joint efforts to make the jewelry store a success, and incurred various liabilities (some of which were credit card cash advances on Allie's cards to increase cash flow into the business).<sup>80</sup>

The court of appeals dealt with Allie's cross-claim that the trial court erred by failing to order attorney's fees by noting that attorney's fees are not provided for by statute but that the agreement with Putz specifically called for attorney's fees in the event that he breached the agreement resulting in enforcement expenses to Allie. Thus, the cause was remanded for determination of reasonable attorney's fees.<sup>81</sup>

*Turner v. Freed*<sup>82</sup> involved a female cohabitant who actually filed a "Petition for Palimony" against her former male cohabitant, Turner.<sup>83</sup> Ms. Freed's claim for relief was based on the theory of unjust enrichment. The evidence revealed that the parties lived together for about ten years; that Freed took care of their child and sometimes Turner's child from a previous relationship; that she regularly maintained the home; and that she contributed financially by performing one of Turner's daily newspaper delivery routes.<sup>84</sup> In return, the trial court found that Turner had time to develop his business and, from the income generated through the business, purchased a home in his name.<sup>85</sup> On appeal Turner claimed that the trial court erred when it found that he had been unjustly enriched by Freed's domestic services. He argued that when parties live together as a family, without marriage, there is a presumption that services are provided to each other without expectation of payment.<sup>86</sup> Turner further complained that the trial court erred by requiring him to pay the cost of a business appraisal.<sup>87</sup>

The court quickly dispatched Turner's argument that living together as a family raises a presumption that services are provided without expectation of payment by noting that it disapproved of such thinking in *Glasgo v. Glasgo*.<sup>88</sup> Thus, it held that there was sufficient evidence to support the trial court's

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80. *Id.* at 581.

81. *Id.* at 582.

82. 792 N.E.2d 947 (Ind. Ct. App. 2003).

83. *Id.* at 949.

84. *Id.* at 950.

85. *Id.*

86. *Id.* at 949-50.

87. *Id.* at 951.

88. *Id.* at 950 (citing *Glasgo v. Glasgo*, 410 N.E.2d 1325, 1332 (Ind. Ct. App. 1980)).



findings that Turner had been unjustly enriched.<sup>89</sup> However, concerning the trial court's requirement that he pay the business appraisal, the court noted that there was no statutory authority for him to pay any of Freed's litigation expenses in an unjust enrichment action.<sup>90</sup>

*Thomas v. Smith*<sup>91</sup> involved yet another attack upon asset distribution incidental to cohabitation. In this case, Michelle Thomas appealed the trial court's ruling dividing the assets accumulated by the parties during cohabitation. Thomas and Smith actually had a marriage ceremony; however, no legal marriage occurred because Thomas was still married to her husband at the time of the ceremony with Smith. They discovered the marriage was not valid approximately five years after the ceremony.<sup>92</sup> Neither Thomas nor Smith thereafter attempted to enter into a valid marriage. Instead, they filed taxes as single persons, acquired real estate in Michelle's name, and adopted three minor children. In 2001, Michelle filed a petition for annulment of the marriage, but she did not request the division of the parties' real or personal property, even though she sought custody and child support. Leslie did not file a request for division of the real or personal property either. Instead, the issue of property distribution was tried by consent.<sup>93</sup> Leslie was awarded custody, child support, and certain property. Michelle was awarded specific property and required to pay child support. On appeal, Michelle contended that the trial court lacked subject matter jurisdiction to divide the property because her marriage to Leslie was bigamous and, therefore, void.<sup>94</sup> On appeal, the court noted that the question of subject matter jurisdiction is purely a question of law and that a judgment entered by a court lacking subject matter jurisdiction is void and may be attacked at any time.<sup>95</sup> Since a bigamous marriage is void according to Indiana statutes,<sup>96</sup> an Indiana court lacks subject matter jurisdiction to dissolve the marriage and order relief under the dissolution statute because the marriage is non-existent.<sup>97</sup> Nonetheless, the court noted that those in a bigamous relationship are not without remedies. For example, parties who have never been married may file a partition action as to real property.<sup>98</sup> Further, a trial court may equitably divide property

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89. *Id.* at 951.

90. *Id.* Freed argued that the court should order expenses under the section of the paternity statute providing for the payment of attorney's fees and costs, IND. CODE § 31-14-18-2(a) (1998), because she had consolidated her unjust enrichment claim with the paternity proceeding she had brought against Turner. Noting that the business appraisal was in no way used for Freed's child support claim against Turner, the court of appeals found that there was no basis upon which the trial court could have required Turner to pay the business appraisal costs. *Turner*, 792 N.E.2d at 951.

91. 794 N.E.2d 500 (Ind. Ct. App.), *trans. denied*, 804 N.E.2d 760 (Ind. 2003).

92. *Id.* at 502.

93. *Id.* at 502-03.

94. *Id.*

95. *Id.* at 503.

96. IND. CODE § 31-11-8-2 (1998).

97. *Rance v. Rance*, 587 N.E.2d 150, 152 (Ind. Ct. App. 1992).

98. *Thomas*, 794 N.E.2d at 503 (citing IND. CODE § 32-17-4-1 (1998)).

acquired during a bigamous relationship if one of the parties requests the action.<sup>99</sup>

In light of the court of appeals' decisions in *Thomas v. Smith*, *Turner v. Freed*, *Putz v. Allie*, and *Hendricks v. Hendricks*, the survey period presented substantial development in the rights of cohabitants upon the breakup of their relationship.

### III. CHILD CUSTODY AND PARENTING TIME

The most significant developments in the areas of child custody and parenting time concern the avenues that third parties may take in actions against the natural parents for custody and visitation. These cases involve blood relatives, such as grandparents, and biological strangers, such as step-parents.

#### A. Third Party Versus Natural Parent Custody Disputes<sup>100</sup>

*In re Paternity of V.M.*,<sup>101</sup> the first appellate decision applying the supreme court ruling in *In re Guardianship of B.H.*, quoted extensively from that decision. In *V.M.* the natural father sought modification of a permanent guardianship placing two of his children in the custody of the children's maternal grandfather. The father, Benavides, originally consented to the guardianship "[b]ecause of his lack of fitness and willingness to parent the children, due in large part to his past drinking problems and criminal behavior."<sup>102</sup> To his credit, Benavides significantly changed his life for the better by getting sober, remarrying, maintaining responsible employment, and becoming involved in church. Without question, he had maintained a relationship with the children through visitation.<sup>103</sup> The court of appeals, beginning its discussion by noting the strong deference that the state pays to the presumption that it is in the best interests of the children that they be in the custody of their natural parent, stated that it was the grandfather's burden to rebut this presumption even in a modification action brought by the father who had previously relinquished custody to him.<sup>104</sup> Quoting, at length, from the Indiana Supreme Court's decision in *B.H.*, the court reiterated the rule and standard of proof in custody disputes between third parties and natural parents:

Despite the differences among Indiana's appellate court decisions confronting child placement disputes between natural parents and other persons, most of the cases generally recognize the important and strong

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99. *Id.* at 503-04 (citing *Rance*, 587 N.E.2d at 152).

100. In a case decided on June 21, 2002, outside the survey period, the Indiana Supreme Court in *In re Guardianship of B.H.*, 770 N.E.2d 283 (Ind. 2002) resolved the conflicting and increasingly divergent Indiana Court of Appeals' decisions regarding the rights of natural parents when confronted by custody claims of third parties and the burden on third parties to prevail.

101. 790 N.E.2d 1005 (Ind. Ct. App. 2003).

102. *Id.* at 1006.

103. *Id.* at 1008.

104. *Id.* at 1007-08.



presumption that the child's best interests are ordinarily served by placement in the custody of the natural parent. . . . To resolve the dispute in the caselaw regarding the nature and quantum of evidence required to overcome this presumption, we hold that, before placing a child in the custody of a person other than the natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement. The trial court must be convinced that placement with a person other than the natural parent represents a substantial and significant advantage to the child. The presumption will not be overcome merely because "a third party could provide the better things in life for the child." In a proceeding to determine whether to place a child with a person other than the natural parent, evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third person, would of course be important, but the trial court is not limited to these criteria. *The issue is not merely the "fault" of the natural parent. Rather, it is whether the important and strong presumption that a child's interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served by placement with another person. This determination falls within the sound discretion of our trial courts, and their judgments must be afforded deferential review.* A generalized finding that a placement other than with the natural parent is in a child's best interests, however, will not be adequate to support such determination, and detailed and specific findings are required.<sup>105</sup>

Thus, though Mr. Benavides had overcome his past and had a solid relationship with his children, the court of appeals noted that the trial court had covered all of its bases by finding that the children would have to share with their father's new children if they lived with him whereas they would have the sole attention of their grandfather and, further, that severing the relationship with the grandfather by modifying custody would seriously mar and endanger their future happiness.<sup>106</sup>

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105. *Id.* (quoting *In re Guardianship of B.H.*, 770 N.E.2d at 287 (emphasis added by the court of appeals) (citations omitted)). The italicized portion of the quote is arguably the supreme court's synthesis of the two lines of appellate court decisions in this area. The line of fault-based cases, represented by *Hendrickson v. Binkley*, 316 N.E.2d 376 (Ind. App. 1974), *cert. denied*, 423 U.S. 868 (1975), has survived. However, in deference to the line of cases abrogated by *B.H.*, namely, *In re Marriage of Huber*, 723 N.E.2d 973 (Ind. Ct. App. 2000); *In re Paternity of L.K.T.*, 665 N.E.2d 910 (Ind. Ct. App. 1996); *Atteberry v. Atteberry*, 597 N.E.2d 355 (Ind. Ct. App. 1992); and *Turpin v. Turpin*, 537 N.E.2d 537 (Ind. Ct. App. 1989), the supreme court added as an alternative to *Hendrickson*'s parental fault-based criteria, the rather vague, "best interests . . . substantially and significantly served by placement with another person." *B.H.*, 770 N.E.2d at 287.

106. *In re Paternity of V.M.*, 790 N.E.2d at 109-09.

The court of appeals' decision in *Nunn v. Nunn*<sup>107</sup> stands for the proposition that the de facto custodian amendment to the child custody statutes permits a step-parent in a dissolution of marriage action to seek custody of a step-child that he has not adopted.<sup>108</sup> The court—noting that a de facto custodian is “a person who has been the primary giver for, and financial support of, a child who has resided with that person for at least: (1) six (6) months if the child is less than three (3) years of age; or (2) one (1) year if the child is at least three (3) years of age.”<sup>109</sup>—found that the step-father had presented evidence tending to rebut the presumption in favor of the natural parent. Moreover, because the de facto custodian amendments permit third parties to seek custody in a dissolution action, the trial court erred by ruling that it did not have jurisdiction to make custody orders as to the child.<sup>110</sup> The facts of the case seem tailor-made for the holding. The child in question was born in September 1997, at which time the

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107. 791 N.E.2d 779 (Ind. Ct. App. 2003).

108. *Id.* at 784. Section 31-17-2-8 of the Indiana Code provides that the trial court “shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following . . .” The statute then lists eight factors, the last of which is “[e]vidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.” *Id.* Section 31-17-2-8.5(b) of the Indiana Code provides:

- (b) In addition to the factors listed in section 8 of this chapter, the court shall consider the following factors in determining custody:
  - (1) The wishes of the child's de facto custodian.
  - (2) The extent to which the child has been cared for, nurtured, and supported by the de facto custodian.
  - (3) The intent of the child's parent in placing the child with the de facto custodian.
  - (4) The circumstances under which the child was allowed to remain in the custody of the de facto custodian, including whether the child was placed with the de facto custodian to allow the parent now seeking custody to:
    - (A) seek employment;
    - (B) work; or,
    - (C) attend school.
- (c) If a court determines that a child is in the custody of a de facto custodian, the court shall make the de facto custodian a party to the proceeding.
- (d) The court shall award custody of the child to the child's de facto custodian if the court determines that it is in the best interests of the child.
- (e) If the court awards custody of the child to the child's de facto custodian, the de facto custodian is considered to have legal custody of the child under Indiana law.

It should be noted that section 31-17-2-8.5(a) of the Indiana Code requires the court to find that a child has been cared for by a de facto custodian by clear and convincing evidence.

109. *Nunn*, 791 N.E.2d at 783 (quoting IND. CODE § 31-9-2-35.5 (1998)).

110. *Id.* at 785.



parties were not married but were dating. Mother informed her future husband that the child might not be his child. Nonetheless, the parties continued to date after the child was born and married in August 1997. Approximately one year later, the parties gave birth to a son. The Petition for Dissolution of Marriage was filed in August 2001, at which time the child in question was approximately four years of age. DNA testing revealed that she was not biologically related to the husband.<sup>111</sup>

*In re Custody of G.J.*,<sup>112</sup> was initiated by the brother of the deceased father. He filed an independent custody action pursuant to section 31-17-2-3(2) of the Indiana Code,<sup>113</sup> as opposed to a guardianship proceeding under the guardianship statute. At the final hearing, the trial court granted the mother's motion to dismiss, which contended that the uncle had no standing, concluding that section 31-17-2-3 of the Indiana Code related only to dissolution of marriage actions and that his action should have been filed under the guardianship statute.<sup>114</sup> It should be noted that the facts spurring the uncle to file his custody action involved the mother's new husband, whom she married within weeks of the death of her first husband, the child's father. Apparently, the new husband was a convicted child molester who collected child pornography. The mother and the child's father were involved in a dissolution of marriage proceeding at the time of the father's death. Prior to his death, the dissolution court prohibited the mother from allowing the child molester to have any contact with the child.<sup>115</sup> The court's decision thus allows third parties with the option to pursue custody of a child in a direct cause of action under section 31-17-2-3(s) of the Indiana Code.<sup>116</sup>

### *B. Grandparent Visitation Cases*

*McCune v. Frey*<sup>117</sup> stands for the proposition that Indiana's Grandparent's Visitation statute<sup>118</sup> requires findings of facts and conclusions of law when

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111. *Id.* at 782.

112. 796 N.E.2d 756 (Ind. Ct. App. 2003).

113. IND. CODE § 31-17-2-3(2) (1998).

114. *G.J.*, 796 N.E.2d at 759.

A child custody proceeding is commenced in the court by:

(1) a parent filing a petition under [Indiana Code section] 31-15-2-4 [actions for dissolution of marriage], [Indiana Code section] 31-15-3-4 [actions for legal separation], or [Indiana Code section] 31-16-2-3 [actions for child support];  
or

(2) a person other than a parent by filing a petition seeking a determination of custody of the child.

IND. CODE § 31-17-2-3 (1998). Section 29-3-5 of the Indiana Code governs proceedings for appointment of guardians over the persons of minors.

115. *G.J.*, 796 N.E.2d at 758-59.

116. *Id.* at 764.

117. 783 N.E.2d 752 (Ind. Ct. App. 2003).

118. IND. CODE § 31-17-5-1 (1998).

issuing a decree granting or denying grandparent visitation.<sup>119</sup> In *McCune*, the paternal grandparents, the Freys, filed their petition requesting set visitation with their grandson. The child's mother, McCune, contended that she discontinued visitation between the child and the Freys for the safety of her child because he had alleged that Mr. Frey had abused him. After hearing, the trial court awarded the grandparents visitation with the child on the first Sunday of each month.<sup>120</sup> Mother appealed, contending that the trial court abused its discretion by failing to determine that visitation was in the child's best interests and by failing to enter findings of facts and conclusions of law.<sup>121</sup> *McCune* thus represents the first clear and complete explication of the elements necessary for a decree granting grandparent visitation, in addition to those contained in the statute. First, the *McCune* court noted the requirements under the act:

Pursuant to the Act, a grandparent may seek visitation only if [] 1) the child's parent is deceased; 2) the child's parents are divorced; or 3) the child was born out of wedlock, but only if the child's father has established paternity. IND. CODE § 31-17-5-1 (1998). The trial court may grant a grandparent's petition for visitation if it determines visitation is in the best interests of the child. IND. CODE § 31-17-5-2 (1998).<sup>122</sup>

Next, the court noted that section 31-17-5-6 of the Indiana Code provides: "Upon hearing evidence in support of and opposition to a petition filed under this chapter, *the court shall enter a decree setting forth the court's findings and conclusions.*"<sup>123</sup> Finally, in order to satisfy the presumption from *Troxel v. Granville* and to avoid unconstitutionality as applied, the court held:

[W]e conclude that when a trial court enters a decree granting or denying grandparent visitation, it must set forth findings of fact and conclusions of law in said decree. In those findings and conclusions, the trial court should address: 1) the presumption that a fit parent acts in his or her child's best interests; 2) the special weight that must be given to a fit

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119. *McCune*, 783 N.E.2d at 759.

120. *Id.* at 754.

121. *Id.* at 756. Mother also contended that the grandparent visitation act is unconstitutional on its face because the Fourteenth Amendment's "strict scrutiny" standard should apply to it and that, applying the standard, "there is no compelling state interest that 'outweighs the infringement on the rights of parents to control the care and upbringing of a child's life.'" *Id.* at 758. Additionally, Mother contended that the grandparent visitation act was unconstitutional as applied. However, the former constitutional challenge was rejected in *Crafton v. Gibson*, 752 N.E.2d 78, 92 (Ind. Ct. App. 2001). The second constitutional challenge was dealt with by noting that any concern with an unconstitutional application of the statute would be remedied by applying the presumption in *Troxel v. Granville*, 530 U.S. 57 (2000), that a fit parent's decision with regard to grandparent visitation is made in the child's best interest.

122. *McCune*, 783 N.E.2d at 756.

123. *Id.* (emphasis added).



parent's decision to deny or limit visitation; 3) whether the grandparent has established that visitation is in the child's best interests; and 4) whether the parent has denied visitation or has simply limited visitation. Also, in determining the best interests of the child, the trial court "may consider whether a grandparent has had or has attempted to have meaningful contact with the child."<sup>124</sup>

*In re Visitation of C.H.*<sup>125</sup> was decided subsequent to the court's decision in *McCune*. In *C.H.*, the trial court denied the grandparents' petition for visitation, specifically finding that the grandparent had not rebutted the presumption that a fit parent acts in the best interest of her child regarding her decision concerning visitations with third parties. Grandparents appealed, contending that the court used an incorrect standard in making its decision.<sup>126</sup> The facts of the case revealed that neither of the parents were unfit, and, with the exception of a brief period of no visitation after a family quarrel, the grandparents actually had visitation with the child—just not on their terms.<sup>127</sup> Accordingly, the court found that the trial court acted within its discretion in declining to order visitation between the child and the grandparents under the circumstances.<sup>128</sup>

*Spaulding v. Williams*<sup>129</sup> involved a trial court's grant of a grandparent's petition for visitation. In that case, the trial court issued a nine page order containing factual findings in paragraph form in which the court basically found that the father's motivation in restricting the grandparent's visitation was "selfish."<sup>130</sup> The facts revealed that the mother, the grandparent's daughter, had custody of the child and that the grandparents were practically a day-to-day part of the child's life until the mother died. After her death, the father permitted substantial visitation until he got into an argument with the grandfather over whether he could live in one of the deceased mother's houses. Thereafter, feelings between the father and the grandparents deteriorated, and the father restricted visitation.<sup>131</sup> Thus, on appeal the court found no error with the trial court's conclusion that the grandparents had met their burden of overcoming the presumption that the father's decision to restrict visitation was in the child's best interest.<sup>132</sup>

*Spaulding*, however, provides interesting guidance for how far the trial court can go to fashion its visitation order. While the court affirmed the trial court's

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124. *Id.* at 757 (citations omitted). In a footnote, the court noted that the consideration—whether a grandparent has had or has attempted to have meaningful contact with the child—is "not the touchstone for determining the child's best interests." *Id.* at 757 n.4 (citation omitted).

125. 792 N.E.2d 608 (Ind. Ct. App. 2003).

126. *Id.* at 609.

127. *Id.*

128. *Id.* at 610.

129. 793 N.E.2d 252 (Ind. Ct. App. 2003).

130. *Id.* at 256, 259.

131. *Id.* at 259-60.

132. *Id.* at 262.

grant of visitation, it remanded with instructions to revise parts of the trial court's order concerning the grandparents right to travel with the child and which incorporated portions of the Indiana Parenting Time Guidelines, permitting unfettered communications between a non-custodial parent and a child by e-mail, faxes, cards, letters, and packages, among other things. Apparently, Father's complaint was not that the travel and additional contact was not "visitation" contemplated by the Grandparent Visitation Act, rather, his complaint was that the travel and additional contact was unrestricted.<sup>133</sup>

The Grandparent Visitation Act does not address contact between grandparents and grandchildren other than "visitation," a term that our legislature has not defined. Because Father does not raise a general challenge to the court's decision to allow contact other than actual visitation, we need not address whether any such contact falls within the scope of the Act. Still, we agree with Father that any contact or communication ordered, other than visitation, should be applied narrowly to preserve and protect a parent's rights . . . .

Rather, we suggest that the court insert the same "unreasonable" language that it included in the telephone contact provision, so that Grandparents would be permitted to send written communications and packages to [the child] without *unreasonable* interference from Father. That qualification would preserve Father's parental role and allow him reasonable discretion in overseeing the communications between Grandparents and [the child].

Similarly, the provision that allows Grandparents to travel "out of the area" with [the child] fails to provide Father with any say over when, where or under what circumstances Grandparents may travel with [the child]. If, for example, Grandparents travel to Virginia to exercise their monthly weekend visitation and wish to take [the child] on a weekend trip "out of the area," Grandparents should be required to receive Father's permission, in addition to providing Father with emergency contact information. In addition, if [the child] visits with Grandparents in Indiana and Grandparents want to travel with the child, they should first obtain Father's permission. And Father must use reasonable discretion in allowing Grandparents to travel with [the child]. In sum, we reverse the two parts of the court's order regarding written communications, packages and travel and remand for the trial court to revise those provisions consistent with this opinion.<sup>134</sup>

Clearly *McCune* and *Spaulding* are important cases inasmuch as they are two of approximately four<sup>135</sup> decided since *Troxel v. Granville* limited the

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133. *Id.* at 262-63.

134. *Id.* at 263-64.

135. The other cases are *Woodruff v. Klein*, 762 N.E.2d 223 (Ind. Ct. App.), *trans. denied*, 774



circumstances under which grandparents could seek visitation.

#### IV. CHILD SUPPORT

*Thurman v. Thurman*<sup>136</sup> discusses several issues raised by Father on his appeal. The most interesting and relevant issue in this case is the first issue, wherein Father argues that he was unfairly surprised in court when Mother raised the issue of a child support arrearage owed by him. Father filed a petition to modify custody and child support. At the hearing, Mother sought to introduce evidence regarding Father's delinquent child support payments and arrearages. Father objected to this evidence, and the trial court overruled Father's objection, but indicated that it would give the parties additional time to address the arrearage issue. Father's counsel agreed at trial that ten days would be sufficient to submit arguments regarding the arrearage issues.<sup>137</sup>

Father first argues that he was not given notice of Mother's intention to seek arrearages. He argues that section 34-47-3-5 of the Indiana Code<sup>138</sup> sets forth the notice requirements necessary for charging someone with indirect contempt. The

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N.E.2d 516 (Ind. 2002), and *Crafton v. Gibson*, 752 N.E.2d 78 (Ind. Ct. App. 2001).

136. 777 N.E.2d 41 (Ind. Ct. App. 2002).

137. *Id.* at 41-42.

138.

(a) In all cases of indirect contempts, the person charged with indirect contempt is entitled:

- (1) before answering the charge; or
- (2) being punished for the contempt;

to be served with a rule of the court against which the contempt was alleged to have been committed.

(b) The rule to show cause must:

- (1) clearly and distinctly set forth the facts that are alleged to constitute the contempt;
- (2) specify the time and place of the facts with reasonable certainty, as to inform the defendant of the nature and circumstances of the charge against the defendant; and
- (3) specify a time and place at which the defendant is required to show cause, in the court, why the defendant should not be attached and punished for such contempt.

(c) The court shall, on proper showing, extend the time provided under subsection (b)(3) to give the defendant a reasonable and just opportunity to be purged of the contempt.

(d) A rule provided for under subsection (b) may not issue until the facts alleged to constitute the contempt have been:

- (1) brought to the knowledge of the court by an information; and
- (2) duly verified by the oath of affirmation of some officers of the court or other responsible person.

IND. CODE § 34-47-3-5 (1998).

court noted that the statute is not applicable here because Mother had not filed a petition for contempt. The court next addressed Father's argument that the only appropriate way to raise a complaint about an arrearage is through a petition for contempt. Mother did not file such a petition. The court of appeals disagrees that a petition for contempt must be filed, citing section 31-16-12-1 of the Indiana Code,<sup>139</sup> *Kuhn v. Kuhn*,<sup>140</sup> and *Haton v. Haton*.<sup>141</sup>

The court concluded that "if a party petitions the trial court to modify a child support order, the entire issue of child support, including arrearages, may be heard without unfair surprise to the party seeking the modification."<sup>142</sup> This case clearly distinguishes this fact situation from one where the parent receiving support petitions for modification of support. It seems clear that the person to whom the support is owed must still provide notice if she intends to seek arrearages.

Another case with a litigant arguing "that wasn't an issue raised in the pleadings" is *Drwecki v. Drwecki*.<sup>143</sup> Noncustodial parent, Father, petitioned the court for contempt, modification of support and for allocation of college expenses. The trial court found that Father had overpaid child support to Mother and ordered a judgment in Father's favor in excess of \$10,000.<sup>144</sup> Mother argued that Father's petition did not allege "that there should be a reduction in child support for the time that the parties' son [B.] was in college. Father only sought an allocation of college education expenses."<sup>145</sup> The court discussed the Child Support Guidelines and found that both the Commentary to the Guidelines and the child support worksheet include as part of the calculation process a recalculation of the amount of child support paid to a custodial parent.<sup>146</sup> Thus, Father's petition for college expense allocation automatically requested a determination of the child support that Father owed Mother. It was not error for the trial court to address this issue.

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139.

Notwithstanding any other law, all orders and awards contained in a child support decree or an order directing a person to pay a child support arrearage may be enforced by:

- (1) contempt, including the provisions under section 6 of this chapter;
- (2) assignment of wages or other income; or
- (3) any other remedies available for the enforcement of a court order;

except as otherwise provided by IC 31-16-2 through IC 31-16-11 or this chapter.

*Id.* § 31-16-12-1.

140. 402 N.E.2d 989 (Ind. 1980) (where a plaintiff filed a suit for accrued child support, but not a petition for contempt).

141. 672 N.E.2d 962 (Ind. Ct. App. 1996) (which discussed a petition to determine and reduce delinquent child support to judgment, without a petition for contempt).

142. *Thurman*, 777 N.E.2d at 43.

143. 782 N.E.2d 440 (Ind. Ct. App. 2003).

144. *Id.* at 442-45.

145. *Id.* at 445 (citing Appellant's Br. at 11).

146. *Id.* at 446.



Other issues raised by Mother in *Drwecki* addressed Father's overpayments of support in light of the recalculation of support and allocation of college expenses. Mother's argument was twofold: that his payments were either voluntary gifts; or, that allowing a credit for his overpayments resulted in an impermissible retroactive modification of child support.<sup>147</sup>

The court found that Father's payments were not voluntary because they were being paid by a wage withholding order during a time period between the child's emancipation and the court's order modifying Father's payment to a lower amount.<sup>148</sup> Father was doing nothing more than obeying the order of the court in effect at the time.

On Mother's next argument, the court recognized the general rule that child support orders cannot be modified retroactively.<sup>149</sup> In this case, however, the effective date of the modification was a date that occurred *after* Father filed his petition.<sup>150</sup> The court cited *Kruse v. Kruse*<sup>151</sup> for the premise that not allowing a court to retroactively modify an order to the date of the petition "detracts from the purposes of the changed circumstances rule and serves to encourage and benefit dilatory tactics."<sup>152</sup> Thus, this is not an impermissible retroactive modification, but should overpayments be applied prospectively? The general rule is that "child support payments cannot be applied prospectively to support not yet due at the time of the overpayment."<sup>153</sup> The purpose of the rule is to ensure a regular cash flow for the custodial parent and to prevent the payor from building up a large credit and then ceasing payments. The court of appeals found that this was not Father's intent in this case, since he did not voluntarily accumulate the large credit.<sup>154</sup> Had Father taken it upon himself to terminate or reduce the payments, he could have been found in contempt. The court stated:

[I]f we do not allow Father to recoup his excess payments made pursuant to the court order, then we will be encouraging non-custodial parents who are current on their support obligation and who believe they deserve a decreased support requirement to unilaterally decrease their support payments before the court orders such a reduction. A better public policy is to encourage parents to stay current on their child support obligations and to follow the court's order until that order is modified; we should not encourage parents to violate court orders out of concern that they will be unable to receive credit for the excess money they

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147. *Id.* at 446-48.

148. *Id.* at 447.

149. *Thacker v. Thacker*, 710 N.E.2d 942, 945 (Ind. Ct. App. 1999).

150. Retroactive application of a modified order is permissible back to the date of the filing of the petition. *Drwecki*, 782 N.E.2d at 449.

151. 464 N.E.2d 934, 939 (Ind. Ct. App. 1984).

152. *Drwecki*, 782 N.E.2d at 449 (quoting *Kruse v. Kruse*, 464 N.E.2d 934, 939 (Ind. Ct. App. 1984)).

153. *Id.* at 448 (quoting *Matson v. Matson*, 569 N.E.2d 732, 733 (Ind. Ct. App. 1991)).

154. *Id.* at 449.

paid.<sup>155</sup>

The court limited its holding to the narrow facts of this case, finding that a payor parent could have an overpayment prospectively applied,

where 1) the petitioning parent has stayed current on his support obligation such that little arrearage exists; 2) the petitioning parent continued to follow the trial court's previous order despite a change in circumstances justifying a decrease in the support obligation; and 3) the trial court modified support to a time after the petition was filed.<sup>156</sup>

*Smith v. Smith*<sup>157</sup> is an example of the application of equitable law to protect a litigant. In this case, the parties divorced in January 1996, and Mother was granted custody of both minor daughters. Almost immediately following the dissolution, the oldest daughter moved to Florida and lived with Father for several years. Shortly after the oldest daughter returned to live with Mother, the younger daughter moved in with Father. The living arrangements remained as such until the youngest daughter was emancipated as a matter of law in June 2001. Following the dissolution, neither party sought to modify the court's order regarding custody or child support.<sup>158</sup> In April 2002, the State filed a petition seeking child support arrears from Father. Mother did not step forward in an attempt to resolve this matter; rather, she joined the State in their efforts to collect child support. The trial court found that there existed "an in gross order of support with a de facto split custodial arrangement not sanctioned by court order, [thus] the Court has no authority under the existing case law to award credit for nonconforming payments."<sup>159</sup> Father's arrearage was found to be \$20,302.<sup>160</sup>

The court of appeals pointed out that there are situations where a non-custodial parent can be awarded a credit for nonconforming child support payments. In *DeMichieli v. DeMichieli*<sup>161</sup> the court of appeals found that a credit will be granted to a noncustodial parent where

the obligated parent by agreement has taken the children in his or her home, assumed custody of them, provided them with necessities, and has exercised parental control over their activities for such an extended period of time that a permanent change of custody has in effect occurred.<sup>162</sup>

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155. *Id.*

156. *Id.* at 449-50.

157. 793 N.E.2d 282 (Ind. Ct. App. 2003).

158. *Id.* at 283-84.

159. *Id.* at 284.

160. *Id.* at 283.

161. 585 N.E.2d 297 (Ind. Ct. App. 1992).

162. *Id.* at 302.



Additionally, consistent with *Isler v. Isler*,<sup>163</sup> a trial court

may afford relief from an unmodified support order if the noncustodial parent has, by agreement with the custodial parent, assumed custody and has provided food, clothing, shelter, medical attention, and school expenses and has exercised parental control for an extended period.<sup>164</sup>

The court of appeals determined that Father would be paying child support twice if the arrearage was affirmed. The court stated that affirming the trial court's decision would "unjustly penalize" Father and "unjustly enrich" Mother.<sup>165</sup> Further, it stated that "such prejudicial and unscrupulous 'gotcha' litigation tactics should not be tolerated."<sup>166</sup> The case was remanded for further proceedings to determine whether to grant some relief to Father from the arrearage previously ordered and, if so, the amount.<sup>167</sup> It is strongly implied by the court's opinion that some significant degree of relief should have been granted to Father.

#### V. PATERNITY

*El v. Beard*<sup>168</sup> is an interpretation of the UIFSA<sup>169</sup> statutes. In this case, Father (a well known athlete in Indiana) filed his paternity action in Indiana, but Mother and child resided in Illinois. The trial court held that it had jurisdiction over paternity and child support, but not over custody and visitation.<sup>170</sup> The trial court established paternity in Father and then set the matter for hearing on the support issues. The court entered several orders regarding support, and Father appealed those orders.<sup>171</sup> Mother filed a cross appeal in this action alleging that Indiana lacked personal jurisdiction over her and, thus, could not issue any child support orders in this case. The court of appeals found the jurisdictional issue to be dispositive; therefore, it did not address Father's issues on appeal.<sup>172</sup>

Indiana Code 31-18-2-1 sets forth the basis for obtaining jurisdiction over a person in an action filed under UIFSA. Father alleged that he had jurisdiction for the following reasons:

In a proceeding to establish, enforce, or modify a support order or to determine paternity, an Indiana tribunal may exercise personal

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163. 425 N.E.2d 667, 670 (Ind. Ct. App. 1981).

164. *Smith*, 793 N.E.2d at 285.

165. *Id.* at 286.

166. *Id.*; see *Wilson Fertilizer & Grain, Inc. v. ADM Mill. Co.*, 654 N.E.2d 848, 856 (Ind. Ct. App. 1995).

167. *Smith*, 793 N.E.2d at 286.

168. 795 N.E.2d 462 (Ind. Ct. App. 2003).

169. Uniform Interstate Family Support Act, IND. CODE § 31-18-1-1 to -9-4 (1998).

170. *El*, 795 N.E.2d at 464.

171. *Id.*

172. *Id.*

jurisdiction over a nonresident individual . . . if:

\* \* \*

(2) the individual submits to the jurisdiction of Indiana by:

(A) consent;

(B) entering an appearance, except for the purpose of contesting jurisdiction; or

(C) filing a responsive document having the effect of waiving contest to personal jurisdiction.

\* \* \*

(6) the individual engaged in sexual intercourse in Indiana and the child:

(A) has been conceived by the act of intercourse; or

(B) may have been conceived by the act of intercourse if the proceeding is to establish paternity.<sup>173</sup>

The court of appeals discounted Father's argument under subsection (2) readily. Prior to the first hearing establishing paternity, Mother filed a motion to dismiss for lack of jurisdiction. When the trial court denied her petition, Mother proceeded to file other pleadings seeking relief and presented her case vigorously in court. The court of appeals stated that a party is not required to sit by idly and not present evidence in the hopes of winning a jurisdictional issue on appeal.<sup>174</sup>

The issue to which the court devotes more time is interpreting subsection 6(B). The court found that by the clear language of the statute, the trial court could not have properly exercised jurisdiction over Mother on the child support issues.<sup>175</sup> This subsection clearly states that the only time a court can exercise jurisdiction over a non-resident party when the child "may have been conceived" in Indiana is for a paternity proceeding. The language of the statute precludes the use of UIFSA for child support under these circumstances.<sup>176</sup>

The court then looked at whether there is evidence to support the argument that the child was born in Indiana. The only evidence that Father presented that the child was born in Indiana was in his initial verified petition for paternity. Mother filed a verified affidavit with her motion to dismiss, asserting that the child was conceived in Illinois. Unfortunately for Father, no other evidence was presented on his behalf to rebut this presumption.<sup>177</sup> The Indiana Supreme Court has stated that "once the party . . . challenges the lack of personal jurisdiction, the plaintiff must present evidence to show that there is personal jurisdiction over the defendant."<sup>178</sup> The court went on to state that "a plaintiff cannot 'maintain his position by pleading under oath and then resting on that pleading.' . . . [N]either . . . the trial court [n]or the appellate court [may] rely on [a] petition as evidence

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173. IND. CODE § 31-18-2-1 (1998).

174. *El*, 795 N.E.2d at 466.

175. *Id.*

176. *Id.*

177. *Id.* at 467.

178. *Id.* (citing *Anthem Ins. Cos. v. Tenet Healthcare Corp.*, 730 N.E.2d 1227, 1231 (Ind. 2000)).



of the facts alleged therein.”<sup>179</sup> Because Mother presented the best evidence that the child was conceived in Illinois, the court held that the trial court did not have jurisdiction over Father for the support issues and reversed the trial court’s order on support.<sup>180</sup>

In the case of *In re Paternity of M.R.*,<sup>181</sup> the UIFSA and UCCJL<sup>182</sup> were applied and interpreted to determine whether the Indiana court had jurisdiction to enter orders on this case. Another popular athlete fathered a child out of wedlock and filed a Petition to Establish Paternity with the trial court. M.R. was born on July 14, 2000. Father executed a paternity affidavit. Mother and M.R. moved to Georgia in late September or early October 2001. Father was traded to the Chicago Bulls, but maintained residency in Indiana. Father filed his petition to establish paternity on April 15, 2002. A hearing was scheduled for April 20, 2002, and, on April 24, 2002, Mother filed her petition to establish paternity in Georgia. Before the hearing, Mother filed a Motion to Dismiss for Lack of Personal Jurisdiction and Insufficient Notice to Persons Outside This State. Mother argued that under the UCCJL, a hearing must be conducted at least twenty days after notice is given to a person living outside Indiana.<sup>183</sup> Father conceded this issue, but argued that the notice requirement did not apply to the support issues. The trial court took evidence and, after briefing by both parties, denied Mother’s motion to dismiss and ordered Father to pay support.<sup>184</sup>

Father argued that the UCCJL is not applicable because custody is not an issue, he only sought to determine paternity and child support. However, this argument was contradicted by Father’s own petition and request for relief, as Father did seek an order regarding “a plan of care for the minor child . . . .”<sup>185</sup> Further, in open court Father’s own counsel asked that the custody and parenting time issues be rescheduled for another hearing date. Following a lengthy discussion about custody and how it is a valid component of a paternity case, the court found that an action for paternity does necessarily include a determination of custody. Therefore, since Mother had been in Georgia for at least six months, Georgia was the child’s “home state” and the Indiana trial court lacked jurisdiction to make a custody determination.

The court next found that the UCCJL only applied to custody determinations, not support.<sup>186</sup> Thus, the UIFSA statutes would need to be examined to determine whether the trial court’s order on support was proper. Mother argued that the trial court lacked jurisdiction under UIFSA. Section 31-18-2-4(b) of the Indiana Code is dispositive of this issue.<sup>187</sup> Not only did Mother file her petition

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179. *Id.* (citing *State v. Sanders*, 596 N.E.2d 225, 227 (Ind. 1992)).

180. *Id.* at 468.

181. 778 N.E.2d 861 (Ind. Ct. App. 2002).

182. Uniform Child Custody Jurisdiction Law, IND. CODE § 31-17-3-1 to -25 (1998).

183. *Id.* § 31-17-3-5(b).

184. *M.R.*, 778 N.E.2d at 866.

185. *Id.* at 865.

186. *Id.*

187. Section 31-18-2-4(b) of the Indiana Code states:

for paternity in Georgia before the time allowed to file a responsive pleading in Indiana expired, she also timely filed her motion to dismiss challenging jurisdiction in the Indiana court. Finally, as the court already determined, Georgia is the home state of the child, not Indiana. The court held that the trial court's order for support must be vacated, but that the order establishing paternity was affirmed.<sup>188</sup>

In *Seger v. Seger*,<sup>189</sup> the court narrows the limits to which Indiana's paternity statutes will stretch to make someone legally responsible for a child. The facts of that case are quite interesting. Wife gave birth to a child prior to the marriage. Both Wife and Husband knew that Husband was not the biological father of child. Following the marriage, the parties went to the local health department and executed a paternity affidavit purporting that Husband was the biological father of child. In his petition for dissolution, Husband stated that no children were born of the marriage. The trial court agreed and rescinded the paternity affidavit. Wife filed an appeal.

The Indiana Court of Appeals recognized in its decision that the signing of a paternity affidavit only creates a legal presumption that the man is the child's biological father.<sup>190</sup> A paternity affidavit is valid only when a mother and a man who "reasonably appears to be the child's biological father" execute the document.<sup>191</sup> The court found that since both parties knew the child was not the biological child of Father, the paternity affidavit was a falsehood from the outset and Mother was precluded from using the paternity statutes in her efforts to make Husband legally responsible for the child.

Mother further argued that the execution of this document was, in effect, an adoption of the child. The court stated that there is no equitable adoption in the

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An Indiana tribunal may not exercise jurisdiction to establish a support order if the petition is filed before a petition or comparable pleading is filed in another state if:

- (1) the petition or comparable pleading in the other state is filed before the expiration of the time allowed in Indiana for filing a responsive pleading challenging the exercise of jurisdiction by Indiana;
- (2) the contesting party timely challenges the exercise of jurisdiction in Indiana; and
- (3) the other state is the home state of the child, if relevant.

IND. CODE § 31-18-2-4(b) (1997).

188. In a footnote, the Indiana Court of Appeals noted that Father argued in his brief that Indiana should not relinquish jurisdiction because the Georgia court in which Mother hopes to pursue her paternity action does not have personal jurisdiction over Father. The court declined to issue an opinion about the jurisdictional issue in Georgia, stating, in essence, that would be Mother's problem, but the court noted that if Father was concerned about jurisdiction in Florida, he could merely consent to jurisdiction. This statement by the court was further clarified on rehearing. See *In re the Paternity of M.R.*, 784 N.E.2d 530 (Ind. Ct. App. 2003) (where Father petitioned to transfer the case, but transfer was dismissed on September 26, 2003).

189. 780 N.E.2d 855 (Ind. Ct. App. 2002).

190. *Id.*

191. IND. CODE § 16-37-2-2.1(b)(1) (1999).



state of Indiana.<sup>192</sup> There are specific procedures that are prescribed by statute that must be followed to complete an adoption. Those procedures were not followed; thus, Mother's adoption argument must fail. The court of appeals agreed with the trial court that the paternity affidavit should be rescinded.

*In re Paternity of K.R.H.*,<sup>193</sup> Mother appealed the trial court's decision to uphold a settlement agreement granting custody of the parties' minor daughter to the Father. The parties to this case spent two days immediately before the trial of the case in depositions. At the conclusion of the depositions, at 7:30 p.m. on the day before trial, the parties entered into settlement negotiations and at 11:00 p.m., the parties reached an agreement that was reduced to writing and signed by both parties. The next day at trial, Mother repudiated the agreement. The trial court upheld the agreement.

Mother argued that the Alternative Dispute Resolution ("ADR") Rules were not followed and that the agreement should have been declared void.<sup>194</sup> The court points out that this was not a formal mediation requiring the application of the ADR Rules. Those rules are only applicable when a court orders mediation. The record was clear that neither party requested mediation and the trial court did not order mediation. Thus, the trial court did not commit error by failing to apply these rules and accepting the agreement.<sup>195</sup>

Mother next argued that the agreement should not have been enforced because she was under duress and the agreement was unconscionable. The court found that there was no duress, as there was no evidence of any threatened violence or physical restraint to Mother if she refused to sign the agreement.<sup>196</sup> Mother's unconscionability argument was not successful either. To prove unconscionability, one must prove that "there was a gross disparity in bargaining power which led the party with the lesser bargaining power to sign a contract unwillingly or unaware of its terms and the contract is one that no sensible person, not under delusion, duress or distress would accept."<sup>197</sup> Again, the court found that Mother failed to show evidence that these factors existed.

Mother's final arguments are that there was not a finalized agreement and that the agreement was not in the best interest of the child. The court found that the parties signed a document called a "Binding Terms Sheet" and that a "meeting of the minds" took place.<sup>198</sup> Thus, the document, while not contemplated to be in final form, was acceptable to form a binding agreement.

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192. *Seeger*, 780 N.E.2d at 858 (citing *Lindsey v. Wilcox*, 479 N.E.2d 1330, 1333 (Ind. Ct. App. 1985)).

193. 784 N.E.2d 985 (Ind. Ct. App. 2003).

194. *Id.* at 990.

195. *Id.*

196. *Id.* (citing *Rutter v. Excel Indus., Inc.*, 438 N.E.2d 1030, 1031 (Ind. Ct. App. 1982)) (stating that "there must be an actual or threatened violence or restraint of a man's person, contrary to law, to compel him to enter into a contract or discharge one" if a contract is to be void due to duress).

197. *Id.* at 991 (quoting *Justus v. Justus*, 581 N.E.2d 1265, 1272 (Ind. Ct. App. 1992)).

198. *Id.* at 992.

Finally, the court found that Mother was unable to prove that the agreement was not in the child's best interest.<sup>199</sup>

The Indiana Court of Appeals found that the agreement was typed and signed; that both parties were represented by counsel; that an integration clause was included in the document; and that no undue influence or duress was placed upon Mother when she signed the document. In affirming the trial court's decision to uphold the agreement, the court cited *Reno v. Haler*,<sup>200</sup> which held that "a written and signed agreement pertaining to custody, once the trial court determines the terms are in the child's best interests, is enforceable, even if a party wishes to repudiate it."<sup>201</sup>

## VI. ADOPTION

One of the most socially controversial cases in this survey period is *In re Adoption of M.M.G.C.*<sup>202</sup> This case carves out a narrow exception in the adoption laws which will now allow homosexual couples to adopt children together. In this case, Shannon Crawford-Taylor, the domestic partner of the litigant, Amber Crawford-Taylor, adopted two Ethiopian children and one Chinese child in 1999 through the international adoption process. She transacted the adoptions as a single parent. In April, 2000, Shannon and Amber jointly filed three adoption petitions with the trial court. The trial court denied the petitions finding that foreign adoptions must be domesticated without modification.<sup>203</sup> On March 29, 2001, Shannon filed Petitions Requesting Comity and Full Faith and Credit in the adoption of all three children. On March 30, 2001, Amber filed petitions to adopt all three children as a second parent. Pursuant to section 31-19-9-1(a)(3) of the Indiana Code, Shannon filed consents to Amber's adoption as a second parent. The trial court ultimately granted Shannon's petitions but denied Amber's petition, finding that Amber must be a relative of Shannon's to adopt the children and the only way to become a legal relative of Shannon is to marry her. Because Indiana does not allow same sex marriage,<sup>204</sup> Amber cannot become a relative and, therefore, cannot adopt with Shannon. The trial court further stated that the only means by which Amber could adopt would be to divest Shannon of her parental rights, and that this was clearly not the intent of the parties.

The Indiana Court of Appeals recognized this as a case of first impression in Indiana. It pointed out first that the trial court erred in finding that Amber must be related to Shannon in order to adopt the children.<sup>205</sup> The adoption statute only requires that a person filing a petition for adoption be a legal resident of

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199. *Id.* at 993.

200. 734 N.E.2d 1095 (Ind. Ct. App. 2000).

201. *K.R.H.*, 784 N.E.2d at 988 (citing *Reno*, 734 N.E.2d at 1099).

202. 785 N.E.2d 267 (Ind. Ct. App. 2003).

203. *Id.* at 268.

204. IND. CODE § 31-11-1-1 (1997).

205. *M.M.G.C.*, 785 N.E.2d at 270.



Indiana.<sup>206</sup> The court went on to note that Indiana law “does not require that the rights of an adoptive parent with respect to the child be divested in the event of a second-parent adoption.”<sup>207</sup> The court found that the trial court’s “legal conclusions [were] not supported by statutory law.”<sup>208</sup> Because no statutory law exists on this issue, the court turned to common law.

The court noted that “[T]he primary concern in every adoption proceeding is the best interest of the child. The state has a strong interest in providing stable homes for children. To this end, early, permanent placement of children with adoptive families furthers the interests of both the child and the state.”<sup>209</sup> The court further stated that it would be in the best interest of the children involved in this case to be “entitled to the legal protections and advantages that a two-parent adoption provides.”<sup>210</sup> In conclusion, the court held that “Indiana’s common law permits a second parent to adopt a child without divesting the rights of the first adoptive parent.”<sup>211</sup> Thus, Amber was also able to adopt the three children previously adopted by her partner, Shannon, in a second-parent adoption.

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206. IND. CODE § 31-19-2-2(a).

207. *M.M.G.C.*, 785 N.E.2d at 270; cf. IND. CODE § 31-19-15-1 (providing that an adoption divests all rights of a *biological* parent with respect to a child except in the case of a stepparent adoption).

208. *M.M.G.C.*, 785 N.E.2d at 270.

209. *Id.* (citing *B.G. v. H.S.*, 509 N.E.2d 214, 217 (Ind. Ct. App. 1987)).

210. *Id.*

211. *Id.*





# SURVEY OF RECENT DEVELOPMENTS IN HEALTH CARE LAW

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Health care in Indiana, as in the rest of the United States, is governed by a dynamic body of law, both state and federal, covering a vast number of topics. Indeed, this 2003 survey discusses disciplines ranging from legislation and litigation to antitrust and immigration, demonstrating the complexities of the practice of health law today.

## I. LEGISLATIVE CHANGES

### *A. Amendments to the Hospital Care for the Indigent Program*

Effective July 1, 2003, many important legislative changes were adopted affecting the Hospital Care for the Indigent Program.<sup>1</sup> Most notably, hospitals licensed under section 16-21 of the Indiana Code began on the effective date to file claims with the State Division of Family and Children<sup>2</sup> (the Division) for payment for emergency care<sup>3</sup> rendered to indigent persons.<sup>4</sup> Physicians<sup>5</sup> and transportation providers<sup>6</sup> will continue to file claims as under the former program, but total aggregate payment to these providers shall not exceed \$3 million in any state fiscal year.<sup>7</sup> Payments made to physicians and transportation providers for services rendered under this program is at the same rate as payment for the same type of services provided for the fee-for-service Medicaid program.<sup>8</sup> Payment to a hospital under this program is in the form of a Medicaid add-on and is subject to the availability of sufficient Hospital Care for the Indigent property tax levies transferred to the Medicaid Indigent Care Trust Fund to pay the non-federal share of Medicaid payments under the Act.<sup>9</sup> To be eligible for assistance under this program, a person must be a citizen of the United States or a lawfully admitted alien,<sup>10</sup> whose medical condition necessitates immediate intervention

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1. See generally 2003 Ind. Acts 255 (effective July 1, 2003).

2. IND. CODE § 12-15-15-9(b) (Supp. 2003).

3. *Id.* § 12-16-3.5-1.

4. *Id.* § 12-16-3.5-3.

5. *Id.* § 12-16-6.5-5.

6. *Id.*

7. *Id.* § 12-16-7.5-5.

8. *Id.* § 12-16-9.5-1.

9. *Id.* § 12-15-15-9.5(d).

10. See *id.* § 12-16-7.5-7.

and treatment,<sup>11</sup> and who is an indigent person.<sup>12</sup> In determining eligibility, the Division shall examine whether the person is a resident of the state.<sup>13</sup> If the person is not a resident of the state or if residency cannot be determined, the Division shall determine the county where the onset of the medical condition that necessitated the care occurred.<sup>14</sup>

To receive payments under the Hospital Care for the Indigent Program, hospitals, physicians, and transportation providers must file applications with the Division within thirty days after treating the affected person.<sup>15</sup> If assistance is denied, the Division shall notify in writing the person affected by the denial and the hospital, physician or transportation provider, any of whom may appeal the determination within ninety days after the mailing of the notice of an adverse determination.<sup>16</sup> If an appeal is filed, a hearing shall be scheduled and notice shall be served upon all persons interested in the matter at least twenty days prior to the hearing.<sup>17</sup>

Among the more important changes to the program is a modification of the methodology used to compute liability for taxes for the Hospital Indigent Care for the counties. For taxes due and payable in 2003, each county shall impose a Hospital Care for the Indigent property tax levy equal to its levy in 2002 multiplied by the county's assessed value growth quotient for taxes due and payable in 2003.<sup>18</sup> For 2004, 2005, and 2006, each county shall impose a Hospital Care for the Indigent property tax levy equal to its levy in the preceding year multiplied by the then current year assessed value growth quotient.<sup>19</sup> For taxes first due and payable in 2007, each county shall impose a Hospital Care for the Indigent tax levy equal to the average annual amount of payable claims attributed to the county during State fiscal years 2004, 2005, and 2006.<sup>20</sup>

The effect of all these changes in the Hospital Care for the Indigent Program was to establish accountability for providers in rendering care and making claims and to ensure stability of taxation and direct per county accountability for the care of indigent persons.

### *B. Health Care Provider Billing Practices*

Several sections of House Enrolled Act 1407 (1407 Act),<sup>21</sup> effective January 1, 2004, made important changes to the manner in which hospitals, hospices,

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11. *Id.* § 12-16-3.5-1.

12. *Id.* § 12-16-3.5-3.

13. *Id.* § 12-16-5.5-1.

14. *Id.* § 12-16-7.5-4.5(a).

15. *Id.* § 12-16-4.5-2 (pertaining to hospitals); *id.* § 12-16-4.5-8 (pertaining to physicians and transportation providers).

16. *Id.* § 12-16-6.5-1.

17. *Id.* § 12-16-6.5-4.

18. *Id.* § 12-16-14-3(b).

19. *Id.* § 12-16-14-3(c).

20. *Id.* § 12-16-14-3(d).

21. 2003 Ind. Acts 178.



home health agencies, health facilities or ambulatory surgical centers bill patients. The 1407 Act requires that if a patient receives notice concerning a third-party billing for a service provided to the patient, the notice must conspicuously state that it is not a bill.<sup>22</sup> Further, the notice may not contain a tear-off portion or a return mail envelope.<sup>23</sup> These provisions are intended to clarify that billing notices should be distinguished from actual billings to prevent confusion for affected patients.

### *C. Testing for Exposure to Communicable Diseases*

Effective July 1, 2003, any patient exposing his or her blood or body fluids to an emergency medical services provider<sup>24</sup> is considered to have consented to testing for the presence of a dangerous communicable disease and to releasing the testing results to a medical director<sup>25</sup> or physician designated by a medical facility.<sup>26</sup> The medical director or physician must notify the emergency medical services provider of the test results.<sup>27</sup>

If a patient subject to this 1407 Act refuses to provide a blood or body-fluid specimen for testing, the exposed provider, his or her employer, or the State Department of Health may petition the circuit or superior court having jurisdiction in the county of the patient's residence or where the exposed provider's employer has its principal office for an order requiring the patient provide a blood or body fluid specimen.<sup>28</sup> The 1407 Act also permits the exposed medical service provider, the provider's employer, or the State Department of Health to petition the circuit or superior court for an order requiring that the patient provide a blood or body fluid specimen in instances when the patient is not in a medical facility.<sup>29</sup>

If a patient is in a medical facility at the time of exposure or is admitted afterward, a physician designated by the medical facility must order a collection of blood or body fluids and complete testing within seventy-two hours after receiving notice of the exposure.<sup>30</sup> The medical director or designated physician must notify the exposed medical services provider of the test results within forty-

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22. IND. CODE § 16-21-2-16 (pertaining to hospitals and ambulatory surgical centers); *id.* § 16-25-3-11 (pertaining to hospices); *id.* § 16-27-1-17 (pertaining to home health agencies); *id.* § 16-28-2-10 (pertaining to health facilities).

23. *See* statutes cited *supra* note 22.

24. IND. CODE § 16-41-10-1 (defining medical services provider as a licensed physician or nurse, firefighter, law-enforcement officer, emergency medical technician, or anyone providing emergency medical services in the course of employment).

25. *Id.* § 16-41-10-2.5(a).

26. *Id.*

27. *Id.*

28. *Id.* § 16-41-10-3(a)(2)(B).

29. *See id.* § 16-41-10-3(a)(2)(B); *id.* § 16-41-10-3.5.

30. *Id.* § 16-41-10-3(a)(1).

eight hours of receipt.<sup>31</sup>

A medical facility is not permitted to physically restrain a patient subject to the 1407 Act in order to test the patient for the presence of a dangerous communicable disease.<sup>32</sup> In lieu of physical restraints, a medical facility must petition the appropriate circuit or superior court for an order requiring the patient to give a specimen.<sup>33</sup> A provider or facility that tests a patient over the patient's objection or without the patient's consent but pursuant to the 1407 Act is immune from liability for the performance of the test.<sup>34</sup> This 1407 Act continues recent policy of the Indiana General Assembly in affording protection to potential victims of dangerous communicable diseases even if a patient's privacy or consent rights are lessened.

#### *D. Indiana Comprehensive Health Insurance Association*

Several sections of House Enrolled Act 1749 (1749 Act),<sup>35</sup> effective on July 1, 2003, made minimal changes to the Indiana Comprehensive Health Insurance Association,<sup>36</sup> usually referred to as ICHIA. ICHIA provides health care insurance coverage to persons who are not eligible for Medicaid and cannot obtain commercial health insurance because of a pre-existing condition or chronic disease or illness. Persons of any age or financial condition may be eligible if they have been rejected for insurance coverage.<sup>37</sup> Funding for ICHIA comes from assessments on health insurers and from premiums from enrolled insureds.<sup>38</sup>

Included in the changes to ICHIA is a new definition of "eligible resident" which is an individual legally domiciled in Indiana for at least twelve months before applying for ICHIA coverage or a federally eligible individual legally domiciled in Indiana.<sup>39</sup> New premium rates have been authorized whereby persons whose family income is less than 351% of the federal income poverty level will be charged not more than 150% of the average premium rate charged by the five carriers with the largest premium volume in the state for an insured in the same class.<sup>40</sup> For those persons whose family income exceeds 351% of the federal income poverty level, they will be charged a premium between 151% and 200% of that charged by the five carriers with the largest premium volume in the

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31. *Id.* § 16-41-10-3(c).

32. *Id.* § 16-41-10-3(a).

33. *Id.* § 16-41-10-2.5(b).

34. *Id.* § 16-41-10-3.5(c) (noting, however, that immunity does not apply to acts or omissions that constitute gross negligence or willful or wanton misconduct).

35. 2003 Ind. Acts 193.

36. IND. CODE § 27-8-10-2.1(a).

37. *Id.* § 27-8-10-1(j) (defining a federally eligible individual).

38. *See id.* § 27-8-10-2.1(f) (requiring an actuarial recommendation in developing member assessments); *id.* § 27-8-10-2.1(g) (describing the methodology for premium determination).

39. *Id.* § 27-8-10-1(z).

40. *Id.* § 27-8-10-2.1(g).



state for an insured in the same class.<sup>41</sup>

Until March 15, 2004, assessments on health insurers to fund ICHIA will require that fifty percent of the program's net annual loss be assessed against health insurers based on an insurer's premiums in proportion to the total health insurance premiums paid in the state during the same period.<sup>42</sup> The remaining fifty percent of the program's net annual loss will be assessed based on the insurer's number of insured individuals in proportion to the total number of insured individuals in the state during the same period.<sup>43</sup> The 1749 Act also permits the ICHIA Board and the Office of Medicaid Policy and Planning<sup>44</sup> to attempt to obtain additional federal Medicaid payments for health care providers that provide services to ICHIA enrollees.<sup>45</sup> The current assessments of the ICHIA program would provide the state share of revenue required for additional Medicaid funding.<sup>46</sup> Payment to providers of services to ICHIA enrollees is limited under the 1749 Act to that amount paid by Medicare for the same services, plus ten percent.<sup>47</sup>

## II. FRAUD AND ABUSE

### *A. Office of Inspector General Semiannual Report*

On December 3, 2003, the Office of Inspector General (OIG), the enforcement arm of the Department of Health and Human Services (DHHS), issued its semiannual report to Congress for the period of April through September 2003.<sup>48</sup> In its report, OIG indicated that its operations resulted in savings of over \$23 billion, including \$1.393 billion in audit receivables, additional recoveries, and investigative receivables.<sup>49</sup> OIG also reported that it had excluded 3275 individuals or entities for Medicare and Medicaid fraud or abuse, convicted 576 individuals or entities of crimes against federal health care programs, and initiated 243 civil actions under the False Claims Act (FCA),<sup>50</sup> civil monetary penalty law, claims alleging unjust enrichment, and administrative recoveries related to providers' self-disclosures.<sup>51</sup> The report highlights several

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41. *Id.*

42. *Id.* § 27-8-10-14.

43. *Id.*

44. See IND. CODE § 12-8-6-1 (2002) (establishing the Office of Medicaid Policy and Planning).

45. IND. CODE § 27-8-10-12 (Supp. 2003).

46. *Id.* § 12-15-15-9.6(8).

47. *Id.* § 27-8-10-12.

48. U.S. DEP'T OF HEALTH AND HUMAN SERVS., 2003 OFFICE OF INSPECTOR GEN. SEMIANN. REP. TO THE CONGRESS [hereinafter HHS SEMIANN. REP.].

49. *Id.* at 46, 51, 55.

50. 31 U.S.C. §§ 3729-3733 (1994).

51. HHS SEMIANN. REP., *supra* note 48, at 14, 51.

areas of intense OIG activity, including prescription drugs,<sup>52</sup> nursing home complaints and staff credentialing,<sup>53</sup> issues regarding organ donation,<sup>54</sup> Medicaid access for foster children,<sup>55</sup> bioterrorism preparedness,<sup>56</sup> and hospital short stay patients transferred to post acute care settings.<sup>57</sup> Deputy Inspector General Dara Corrigan indicated that current fiscal year savings represented a record high for the OIG.<sup>58</sup>

The semiannual report was preceded by the OIG's work plan for fiscal year 2004.<sup>59</sup> According to its work plan, the OIG plans to focus its efforts primarily on Medicare issues. As in most years, the fiscal year 2004 work plan indicates that the OIG will review Medicare contractor performance.<sup>60</sup> Medicare fiscal intermediaries and carriers, those responsible for processing Medicare claims and Medicare cost reports, will be subject to recommendations and corrective actions where appropriate.<sup>61</sup>

OIG will also focus on nursing home issues in fiscal year 2004, including quality of care, state compliance with nursing home complaint investigation guidelines, and effectiveness of CMS and state enforcement actions against noncompliant nursing homes.<sup>62</sup> For hospitals, OIG will continue an investigation into hospital inpatient outlier claims to determine whether such claims were submitted according to Medicare rules and to identify program vulnerabilities with regard to outlier payments, and will also extend the outlier investigation to the Medicaid program.<sup>63</sup> OIG will also look at the inpatient prospective payment system rates to determine whether the market basket updates used in computing those rates are sufficient and equitable.<sup>64</sup>

Durable medical equipment will continue to be a focus of the OIG in 2004, including the continuing investigation into power wheelchairs and other high cost items.<sup>65</sup> OIG will also investigate whether DME suppliers are appropriately using and maintaining certificates of need in accordance with local law (which are not presently required in the State of Indiana), and whether documentation in support of claims for DME support medical necessity and demonstrate the

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52. *Id.* at 19, 20.

53. *Id.* at 34.

54. *Id.* at 29.

55. *Id.* at 36.

56. *Id.* at 28.

57. *Id.* at 4.

58. *Id.* at introduction.

59. U.S. DEP'T OF HEALTH & HUMAN SERVS., WORK PLAN: FISCAL YEAR 2004, OFFICE OF INSPECTOR GENERAL.

60. *Id.* at 21.

61. *Id.*

62. *Id.* at 8.

63. *Id.* at 2.

64. *Id.* at 1.

65. *Id.* at 14.



items to be reasonable and necessary.<sup>66</sup>

A significant component of the fiscal 2004 work plan focuses on Medicaid drug pricing. OIG will audit and evaluate physician acquisition costs for Medicaid prescription drugs, particularly looking into the amount below average wholesale price that doctors pay for drugs.<sup>67</sup> OIG will also compare average manufacturer prices with average wholesale prices, and evaluate trends in drug rebate programs in compliance with drug rebate pricing laws.<sup>68</sup> Finally, OIG will investigate the effects that new versions of existing drugs have on the Medicaid drug rebate program, assessing the adequacy of drug manufacturers' calculations of average manufacturers' prices and best prices, and uncollected drug rebates billed to drug makers.<sup>69</sup>

### B. *Developments in the FCA*

The FCA has become an extremely important weapon in the fight against Medicare and Medicaid fraud and abuse. In particular, the statutory requirement that a portion of any recoveries in an FCA case brought as a private right of action should be paid to a whistle blower or *qui tam* relator<sup>70</sup> has catalyzed an enormous volume of private suits brought on behalf of the government. This section will highlight some of the more notable developments in FCA litigation.

1. *Implied Certification*.—During the survey period, courts have evaluated a theory of liability dubbed “implied false certification,” which expands upon the “false certification” theory of FCA liability.<sup>71</sup> The false certification theory is based on the fact that Medicare and Medicaid claims include certifications from the claimant that it will comply with applicable law.<sup>72</sup> For example, the standard form for submitting Medicare and Medicaid claims for physicians' services expressly states:

I certify that the services shown on this form were medically indicated and necessary for the health of the patient and [sic] were personally furnished by me or were furnished incident to my professional service by my employee under my immediate personal supervision. . . . No Part B Medicare benefits may be paid unless this form is received as required by existing law and regulations.<sup>73</sup>

The false certification theory suggests that a health care provider may be liable under the FCA if the claim includes a knowingly false certification that the

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66. *Id.*

67. *Id.* at 28.

68. *Id.*

69. *Id.* at 29.

70. 31 U.S.C. § 3730(d) (1994).

71. *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 696 (2d Cir. 2001).

72. 42 C.F.R. § 424.32 (2003); *see Mikes*, 274 F.3d at 698 (“An expressly false claim . . . falsely certifies compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment.”).

73. Form CMS-1500, available at <http://www.cms.hhs.gov/providers/edi/cms1500.pdf>.

claimant complied with applicable statutes and regulations, even if the allegedly false claim accurately reflects the applicable services and fees and does not otherwise contain untrue statements.<sup>74</sup> Liability under the false certification theory only attaches, however, if the government would not have paid the claim had it known of the underlying violation of law.<sup>75</sup> The theory assumes that the health care provider is aware of all applicable law with respect to the right to payment under a claim, and that based on that assumed body of knowledge is guilty of fraud if it submits a claim in violation of any applicable law.<sup>76</sup>

“*Implied* false certification” takes the false certification theory further, suggesting that a claimant can be liable under the FCA for submitting a facially accurate and true claim for which it failed to comply with all applicable laws and

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74. *Id.*; United States *ex rel.* Hopper v. Anton, 91 F.3d 1261, 1266-67 (9th Cir. 1996). Violations of laws, rules, or regulations alone do not create a cause of action under the FCA. It is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit. . . . “The heart of fraud is an intentional misrepresentation. A violation of a regulatory provision, in the absence of a knowingly false or misleading representation, does not amount to fraud.”

*Id.* (citations omitted).

75. *Mikes*, 274 F.3d at 697.

[A] claim under the Act is legally false only where a party certifies compliance with a statute or regulation as a condition to governmental payment. *See* United States *ex rel.* Siewick v. Jamieson Sci. & Eng’g, Inc., 214 F.3d 1372, 1376 (D.C. Cir. 2000) (“[A] false certification of compliance with a statute or regulation cannot serve as the basis for a *qui tam* action under the [FCA] unless payment is conditioned on that certification.”); Harrison [v. Westinghouse Savannah River Co.], 176 F.3d [776], 786-87, 793 [(4th Cir. 1999)]; United States *ex rel.* Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1997); United States *ex rel.* Hopper v. Anton, 91 F.3d 1261, 1266-67 (9th Cir. 1996).

*Id.*

76. *But see* United States *ex rel.* Perales v. St. Margaret’s Hosp., 243 F. Supp. 2d 843 (C.D. Ill. 2003):

Mere non-compliance with a statute or regulation, in the absence of a false certification, is insufficient to constitute a false statement within the meaning of the FCA. . . . “The Supreme Court has cautioned, however, that the FCA is not designed to punish every type of fraud committed upon the Government.” . . . The FCA is not intended “to operated [sic] as a stalking horse for enforcement of every statute, rule, or regulation.” . . . To hold that the mere submission of a claim for payment, without more, always constitutes an “implied certification” of compliance with the conditions of the Government program seriously undermines this principle by permitting FCA liability potentially to attach every time a document or request for payment is submitted to the Government, regardless of whether the submitting party is aware of its non-compliance. While ignorance of the law is usually no excuse to justify one’s actions, the FCA requires that a false statement be made with actual knowledge, deliberate ignorance, or reckless disregard of the statement’s falsity.

*Id.* at 865-66 (citations omitted).



regulations affecting the right to receive payment under the claim, even where no express certification is made.<sup>77</sup> Importantly, the theory has been limited to instances in which the claimant allegedly violated a law upon which payment was conditioned.<sup>78</sup> Several decisions in 2003 support such a limitation.<sup>79</sup> Whether

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77. *Mikes*, 274 F.3d at 700 (“[I]mplicitly certified compliance with a particular rule as a condition of reimbursement [should apply only] in limited circumstances.”); *see also* United States *ex rel.* Franklin v. Parke-Davis, 2003 WL 22048255, \*7 (D. Mass. 2003) (“The Court agrees with the government that recent caselaw supports implied-certification FCA claims in the healthcare context, including kickback-based claims.”).

78. *Mikes*, 274 F.3d at 700 (“Specifically, implied false certification is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies expressly states the provider must comply in order to be paid.”); *see also* United States *ex rel.* Willard v. Humana Health Plan Inc., 336 F.3d 375, 382 (5th Cir. 2003) (stating “the critical point is that an action on which payment was conditioned had not been performed.”). The *Willard* court noted that:

Other circuits that have recognized the “implied certification” theory have also set forth this requirement. *See* United States *ex rel.* Augustine v. Century Health Svs., Inc., 289 F.3d 409, 415 (6th Cir. 2002); *Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001); United States *ex rel.* Siewick v. Jamieson Sci. & Eng’g, Inc., 214 F.3d 1372, 1376 (D.C. Cir. 2000).

*Id.* at 382. The *Willard* court, however, decided that it “need not determine here whether it will recognize the ‘implied certification’ theory, because even if assuming for the sake of argument we were to apply such a theory here, Willard would still lack a cognizable claim . . .” *Id.* at 382. The court further noted that the plaintiff “failed to allege facts that would show that [the government] conditioned its payment to Humana on any implied certification of compliance with the anti-discriminatory regulations . . . [, and that the plaintiff failed to allege] facts sufficient to reflect that there was any regulatory violation.” *Id.* at 382-83.

79. United States *ex rel.* Coppock v. Northrup Grumman Corp., 2003 WL 21730668, at \*11 (N.D. Tex. 2003) (“As the court recognized [previously], certification, whether implied or express, must be a prerequisite to a received benefit before it can be considered legally false.”); *see also* United States *ex rel.* Gross v. AIDS Research Alliance-Chicago, 2003 WL 22508153, at \*3 (N.D. Ill. 2003) (“Where plaintiffs rely on technical violations to support a false certification FCA claim, the Seventh Circuit has required them to demonstrate some motive for the alleged deception.”); United States *ex rel.* Cooper v. Gentiva Health Svs., Inc., 2003 WL 22495607, at \*8 (W.D. Pa. 2003) (“[T]he implied certification theory applies ‘only when the underlying . . . regulation . . . expressly states [that] the provider must comply in order to be paid.’” (citation omitted)); United States *ex rel.* Graves v. ITT Educ. Svs., Inc., 284 F. Supp. 2d 487, 497 (S.D. Tex. 2003) (“The Fifth Circuit, with the Second, Fourth, Ninth, and District of Columbia Circuits, has held that a claim under the [FCA] is ‘legally false’ only where a party affirmatively certifies compliance with a statute or regulation as a condition to receiving governmental payment or property.”); United States *ex rel.* McCabe v. Lincoln Tech. Inst., Inc., 2003 WL 22474586, at \*3 (N.D. Tex. 2003) (“The Fifth Circuit has not addressed whether it will recognize the ‘implied certification theory.’ However, as this Court previously recognized, under either implied or express certification theories, the certification must be a prerequisite to receive the government benefit in order to be legally false.” (citations omitted)). “The critical question is whether the certification of compliance with a particular regulation or statute was a condition for payment by the government.” *Id.* at \*4.

payment is conditioned on compliance with any given law suggests that a materiality standard applies to false certification and implied false certification allegations.

2. *Materiality*.—The plain language of the FCA does not state that materiality of the alleged falsehood should play a role in applying the FCA.<sup>80</sup> The FCA does require, however, that a defendant must have knowingly submitted a false claim, and further must have *knowingly* intended to commit fraud against the government.<sup>81</sup> Recent cases have indicated that the law allegedly violated must be material to the provider's right to receive payment—that the government would not have paid the claim were it aware of the violation.<sup>82</sup> Thus, courts are increasingly using a materiality requirement to evaluate the falsehood underlying the alleged violation. The consensus among courts examining the issue is that the fact that a claimant makes a claim false must be material to the claimant's right to receive payment from the government, and that the government would not have paid the claim were it aware of the false fact.

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80. 31 U.S.C. §§ 3729 (1994).

81. *Id.* § 3729(a).

82. *United States ex rel. Barrett v. Columbia/HCA Healthcare Corp.*, 251 F. Supp. 2d 28, 33 (D.D.C. 2003) ("The implied certification theory essentially requires a materiality analysis. Certification of compliance with the statute or regulation alleged to be violated must be so important to the contract that the government would not have honored the claim presented to it if it were aware of the violation."); *United States ex rel. Bidani v. Lewis*, 264 F. Supp. 2d 612, 614 (N.D. Ill. 2003).

To succeed, Bidani must show that the alleged AKS violation was material to the government's treatment of defendants' Medicare claims. . . . Courts have split over whether the FCA materiality element requires a showing of outcome materiality . . . or claim materiality. . . . In addressing this issue the Seventh Circuit leans toward an outcome materiality definition, stating that an omission must be "material to the government's buying decision."

*Id.*; *Coppock*, 2003 WL 21730668, at \*11 ("[C]ertification, whether implied or express, must be a prerequisite to a received benefit before it can be considered legally false. . . . 'Mere regulatory violations do not give rise to a viable FCA action . . . where regulatory compliance was not a *sine qua non* of receipt of [benefit].'" (citation omitted)); *United States ex rel. Costner v. United States*, 317 F.3d 883, 887 (8th Cir. 2003).

Although we have not heretofore directly considered whether a materiality element is implicit in the Act, we have stated that the Act provides recovery from one "who makes a material misrepresentation to avoid paying some obligation owed to the government."

Moreover, our decision in *Rabushka ex rel. United States v. Crane Co.* suggests that outcome materiality is the proper standard.

*Id.*; *Gross*, 2003 WL 22508153, at \*2 ("Only statements that are materially false when made can be fraudulent. . . . There can be no 'fraud in hindsight,' and innocent mistakes and negligence are not actionable." (citations omitted)). The Fifth Circuit has decided a FCA case, not in the health care context, determining that a false statement must be material, and the falsity must have been such that it would negate the claimant's right to be paid, before the false statement is actionable under the FCA. *United States v. Southland Mgmt. Corp.*, 326 F.3d 669 (5th Cir. 2003).



Inextricably linked to the materiality of the alleged falsehood is the defendant's knowledge and intent: if the defendant did not know of the falsity of the claim, and did not intend to defraud the government, there can be no false claim.<sup>83</sup> The thrust of the cases following this logic is that the FCA is a fraud statute, and if the defendant did not knowingly intend to commit fraud then there can be no violation.<sup>84</sup>

3. *Pleading by Example*.—Another interesting development in the FCA deals with the extent of the plaintiff's knowledge. A whistleblower, a person who brings suit on behalf of the government, may allege that a health care provider submitted a volume of false claims based on a limited number of examples, which is permissible under the Federal Rules of Civil Procedure.<sup>85</sup> A plaintiff's right to plead by example must be balanced with the pleading requirements of Rule 9(b).<sup>86</sup> Rule 8<sup>87</sup> allows a plaintiff to allege multiple false claims based on one or more examples *if the plaintiff has personal knowledge of the multiple claims*, while Rule 9(b) requires that in "all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."<sup>88</sup> Claims about which the plaintiff has no personal knowledge cannot be stated with particularity, and thus the plaintiff can only satisfy the pleading requirements of Rule 9(b) with respect to the example or examples. Some relators have sought to plead vast numbers of claims by example without the requisite knowledge, often to gain access through the discovery process to the goldmine that is a provider's patient records and banking on the fact that discovery into the provider's records will reveal other false claims upon which to build a stronger case.<sup>89</sup> "[A]lthough Yuhasz argues that he cannot obtain the information demanded by the trial court absent discovery, 'there is no general right to discovery upon filing of the complaint. The very purpose of Fed.R.Civ.P.

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83. 31 U.S.C. § 3729(a) (1994); *see, e.g., Gross*, 2003 WL 22508153, at \*2-3; *United States v. Medica-Rents Co.*, 285 F. Supp. 2d 742, 769 (N.D. Tex. 2003).

[M]ost Courts, including those in the Fifth Circuit, require a fourth element: materiality.

"Liability for both a 'false claim' and a 'fraudulent claim' implicitly requires a showing that what makes the claim either false or fraudulent is material to the asserted claim of entitlement to receive money or property from the government."

*Id.* (citing *United States ex rel. Wilkins v. North Am. Constr. Corp.*, 173 F. Supp. 2d 601, 619 n.10 (S.D. Tex. 2001)). "After reviewing the case precedent, the [c]ourt concludes that materiality is a necessary element of a cause of action under the FCA." *Medica-Rents*, 285 F. Supp. 2d at 769 n.62.

84. *Medica-Rents*, 285 F. Supp. 2d at 769 n.2; *see Costner*, 317 F.3d at 887-88; *United States ex rel. Watson v. Conn. Gen. Life Ins. Co.*, 2003 WL 303142 (E.D. Penn. 2003).

85. FED. R. CIV. P. 8; *see also United States ex rel. Harris v. Bernad*, 275 F. Supp. 2d 1, 8-9 (D.D.C. 2003); *United States ex rel. Franklin v. Parke-Davis*, 147 F. Supp. 2d 39, 46-47 (D. Mass. 2001).

86. FED. R. CIV. P. 9(b).

87. FED. R. CIV. P. 8.

88. FED. R. CIV. P. 9(b); *see Harris*, 275 F. Supp. 2d at 8-9; *Franklin*, 147 F. Supp. 2d at 46-47.

89. *See, e.g., Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559 (6th Cir. 2003).

12(b)(6)' is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery."<sup>90</sup> Such a "fishing expedition" is not supported by the Federal Rules of Civil Procedure, and has been rejected by various courts during the survey period.<sup>91</sup>

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90. *Id.* at 566 (citation omitted).

91. *United States ex rel. Barmak v. Sutter Corp.*, 2003 WL 21436213, at \*6 (S.D.N.Y. 2003). To hold otherwise would open the court's [sic] to a raft of baseless fraud suits brought by outsiders solely on the hope and expectations of finding something to justify a recovery. The smear of fraud on the good name of those innocent defendants could neither be erased nor compensated. Relator's outsider status is not a recognized exception to requirements of Rule 9(b).

*Id.*; *see United States ex rel. Doe v. Dow Chem. Co.*, 343 F.3d 325, 328 (5th Cir. 2003) ("Claims brought under the FCA must comply with Federal Rule of Civil Procedure 9(b), which requires pleading with particularity in cases alleging fraud."); *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 641 (6th Cir. 2003) ("We recently held in a published case that a complaint alleging FCA violations must allege the underlying facts with particularity as required by Rule 9(b)."); *United States ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 376 (7th Cir. 2003) ("These rules [9(b) and 8(a)] are not in conflict; it is possible to write a short statement narrating the *claim*—which is to say, the basic grievance—even if Rule 9(b) requires supplemental particulars."); *United States v. Cancer Treatment Ctrs.*, 2003 WL 21504998, at \*2 (N.D. Ill. 2003).

And fraud must be pleaded with particularity. But the breadth of the claims may be such that alleging all the "who, what, when and where" of the claims would lead, ultimately, to an extremely long, complex and incomprehensible complaint. Still, a *qui tam* action is not a roving commission to investigate all the financial dealings of the defendants. . . . Here, the relator has alleged some specific examples. That saves the complaint from total dismissal. In other allegations there are no specific examples, or examples alleged are somewhat general or lack the who or the when. Relator contends she can add details as necessary and talks about filing another amended complaint. We think the better way to proceed is by tailoring discovery to the specificity of the claims . . . .

*Id.*; *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 2003 WL 21228801, at \*4, \*9 (D. Mass. 2003).

Even where allegations are based on information and belief, however, "claims . . . of fraud may not be based upon speculation or conclusory allegations," but fact. [A] "complaint demonstrates the proposition that a 'complaint can be long-winded, even prolix, without pleading with particularity. Indeed, such a garrulous style is not an uncommon mask for an absence of detail.'"

*Id.* (citation omitted); *United States ex rel. Stewart v. La. Clinic*, 2003 WL 21283944, at \*9 (E.D. La. 2003) ("The district judge specifically held that relators had been given ample opportunity to identify fraud, noted that the balance of the equities in this case weigh against further leave to amend, and proscribed further proceedings bent on 'finding fraud during the discovery process.'"); *see also Yuhasz*, 341 F.3d at 563 ("The requirement that fraud be plead with particularity need not be relaxed in FCA cases in order to protect the public because the government's ability to intervene on the basis of information brought to its attention vindicates the public interest."); *Watson*, 2003 WL 303142, at \*9.



4. *Erosion of Sovereign Immunity.*—Governmental defendants have argued that governments are not “persons” within the meaning of the FCA, and because the FCA provides for treble damages,<sup>92</sup> such damages further punitive objectives and thus are not applicable to governmental defendants.<sup>93</sup> The U.S. Supreme Court decided, in 2000, that the Vermont Agency of Natural Resources, as a state body, was a not “person” within the meaning of the FCA.<sup>94</sup> The decision was based, in part, on the punitive character of the treble damages provision.<sup>95</sup> Based on the Supreme Court’s 2000 decision, Cook County, Illinois, sought dismissal of a whistleblower’s FCA suit in 2003.<sup>96</sup>

The Supreme Court held that local governments are “persons” subject to the FCA on the rationale that corporations are “persons” within the meaning of the FCA; at the time the FCA was enacted, municipal corporations existed; and the legislative history behind the FCA contains no mention of an exclusion of municipalities from the class of “persons” covered by the Act.<sup>97</sup> Thus, the Court ruled, a county municipal corporation is a person under the FCA.<sup>98</sup> A state, however, is not a municipal corporation, the Court noted in distinguishing *Chandler* from *Stevens*.<sup>99</sup>

Contrasting the potentially punitive nature of remedies under the FCA with the exclusively punitive nature of traditional punitive damages, the Supreme Court disagreed with the County that FCA damages do not apply to a county. The Court noted that a judge, not a jury, will determine the ultimate amount to be awarded in a FCA case, and thus the judge can ensure that the municipality will not be subject to unlimited punitive damages.<sup>100</sup> Furthermore, the Court dismissed the argument that local taxpayers will ultimately pay the punitive damages by finding that “[t]his very case shows how FCA liability may expose only local taxpayers who have already enjoyed the indirect benefit of the fraud, to the extent that the federal money has already been passed along in lower taxes or expanded services.”<sup>101</sup> The Supreme Court thus affirmed the Seventh Circuit’s decision that municipal corporations constitute persons for purposes of the FCA.<sup>102</sup>

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92. 31 U.S.C. § 3729(a)(7) (1994).

93. See *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003).

94. *Vt. Agency of Natural Res. v. United States ex. rel. Stevens*, 529 U.S. 765 (2000).

95. *Id.* at 784.

96. *Chandler*, 538 U.S. at 119.

97. *Id.* at 128-29.

98. *Id.* at 134.

99. *Id.* at 130.

100. *Id.* at 132; 31 U.S.C. § 3729(a) (1994).

101. *Chandler*, 538 U.S. at 132.

102. *Id.* at 122 (“[T]he question is whether local government are amenable to such suits, and we hold that they are.”). The Supreme Court in *Chandler* stated as follows:

While § 3729 does not define the term “person,” we have held that its meaning has remained unchanged since the original FCA was passed in 1863. There is no doubt that the term then extended to corporations, the Court in 1826 having expressly recognized

5. *Qui Tam Relator's Statutory Share*.—The Sixth Circuit Court of Appeals recently ruled in support of a *qui tam* relator seeking payment from the federal governments recovery against Community Health Systems, Inc.<sup>103</sup> Sean Bledsoe had filed a *qui tam* action against Community Health Systems, Inc. (CHS) related to Medicare and Medicaid billing.<sup>104</sup> The government declined intervention in Bledsoe's case, but thereafter filed a separate suit against CHS based on the same facts that Bledsoe raised in his original complaint.<sup>105</sup> CHS ultimately settled the government's suit for nearly \$31 million.<sup>106</sup> The government declined to provide Bledsoe with a statutory share of 15 to 30% of the proceeds obtained by the government.<sup>107</sup> The government contended that the relator's complaint was materially defective, did not plead with particularity the facts supporting relators claims and did not constitute an original source of information upon which the government based its own FCA complaint.<sup>108</sup>

The court ruled that the statutory language of the FCA speaks directly to the question at bar: "If any such remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section."<sup>109</sup> Notwithstanding the government's right to intervene in a *qui tam* relator's suit, the government may elect to pursue its claim through any alternate remedy

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the presumption that the statutory term "person" extends as well to persons politic and incorporate, as to natural persons whatsoever. . . . Essentially conceding that private corporations were taken to be persons when the FCA was passed in 1863, the County argues that municipal corporations were not so understood until six years later, when *Cowles v. Mercer County*, 7 Wall. 118, 19 L.Ed.86 (1868), applied the *Letson* rule to them. *Cowles*, however, was not an extension of principle but a natural recognition of an understanding going back at least to Coke, *supra*, that municipal corporations and private ones were simply two species of "body politic and corporate," treated alike in terms of their legal status as persons capable of suing and being sued. . . . Indeed, "[t]he archetypal American corporation of the eighteenth century [was] the municipality"; only in the early nineteenth century did private corporations become widespread.

*Id.* at 125-27 (citations omitted); *see also* *Donald v. Univ. Bd. of Regents*, 329 F.3d 1040, 1044 (9th Cir. 2003) ("[W]e are persuaded that the Court's holding in *Stevens*--that a private party may not bring a *qui tam* action against a state entity under § 3729(a) of the FCA—forecloses the relator's § 3730(d)(1) claim to a share of the proceeds from the government's settlement with the Regents."); *United States v. Hickman County, Tenn.*, 60 Fed. Appx. 569, 570, 2003 WL 1465335 (6th Cir. 2003) ("[L]ocal governments are considered persons under the FCA and the potential remedy of treble damages does not preclude recovery against a county government."); *United States ex rel. Sarasola v. Aetna Life Ins. Co.*, 319 F.3d 1292 (11th Cir. 2003).

103. *United States ex. rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634 (6th Cir. 2003).

104. *Id.* at 637.

105. *Id.*

106. *Id.* at 639.

107. *Id.* at 639-40; 31 U.S.C. § 3730(d) (1994).

108. *Bledsoe*, 342 F.3d at 643, 646.

109. 31 U.S.C. § 3730(c)(5).



available to the government, including any administrative proceeding to determine a civil monetary penalty.<sup>110</sup> The court deemed the government's independent settlement negotiations with the defendant CHS to be such an alternate remedy, entitling the relator to his statutory share.<sup>111</sup> "We hold that 'alternate remedy' refers to the government's pursuit of any alternative to intervening in a relator's *qui tam* action."<sup>112</sup> The circuit court remanded the case to the district court to determine the appropriate amount of the \$31 million recovery to be paid to Bledsoe.<sup>113</sup>

### III. PRIVACY

#### A. Privacy Legislation

The Centers for Medicare and Medicaid Services (CMS) issued answers to frequently asked questions about the Health Insurance Portability and Accountability Act of 1996 (HIPAA)<sup>114</sup> Privacy Rule<sup>115</sup> that offered some insight as to how the Privacy Rule would be interpreted.<sup>116</sup> The Department of Health and Human Services (HHS) issued the first installment of its so-called Enforcement Rule on April 17, 2003, effective until September 2004,<sup>117</sup> which established rules of procedure under which the Secretary of HHS may impose civil money penalties on entities that violate HIPAA privacy regulations.<sup>118</sup> Compliance with the Transactions Rule<sup>119</sup> was originally required by October 16, 2003, but on July 24, 2003, CMS issued guidance effectively giving covered entities more time to comply.<sup>120</sup> The guidance indicated that covered entities could continue to send and accept non-HIPAA standard transactions without the fear of fines or penalties as long as they could show a good faith effort to become

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110. *Bledsoe*, 342 F.3d at 647.

111. *Id.* at 651.

112. *Id.* at 647.

113. *Id.* at 651.

114. Health Insurance Portability and Accountability Act, Pub L. No. 104-191, 110 Stat. 1936 (1996) (codified in scattered sections of 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

115. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,461 (Dec. 12, 2000) (codified at 45 C.F.R. pts. 160, 164).

116. See <http://answers.hhs.gov> for the FAQ's.

117. Civil Money Penalties: Procedures for Investigations, Imposition of Penalties, and Hearings, 68 Fed. Reg. 18,895 (Apr. 17, 2003) (to be codified at 45 C.F.R. pt. 160).

118. 45 C.F.R. § 160.500 (2003).

119. Health Insurance Reform: Standards for Electronic Transactions, 65 Fed. Reg. 50,312 (Aug. 17, 2000) (to be codified at 45 C.F.R. pts. 160, 162).

120. DEP'T OF HEALTH & HUMAN SERVS., GUIDANCE ON COMPLIANCE WITH HIPAA TRANSACTIONS AND CODE SETS; AFTER THE OCTOBER 16, 2003, IMPLEMENTATION DEADLINE, (2003), available at <http://www.cms.hhs.gov/hipaa/hipaa2/education/guidance-final.pdf>.

compliant.<sup>121</sup> The Indiana Health Records Act<sup>122</sup> was amended to control disclosures of patient information consistent with the analogous provisions of HIPAA.<sup>123</sup>

### *B. Mental Health*

The Indiana Court of Appeals recently decided *In re Commitment of Berryman*,<sup>124</sup> which determined the extent to which a defendant in a murder case has a right to maintain confidentiality of mental health records. Alan Lee Berryman was found not responsible for the murder of Keith Krieger by reason of insanity.<sup>125</sup> Berryman was subsequently involuntarily committed to Logansport State Hospital pursuant to the Voluntary and Involuntary Treatment of Mentally Ill Individuals Act.<sup>126</sup> Within the commitment order was a requirement that, pursuant to the Act, the Logansport State Hospital's superintendent or Berryman's attending physician would provide the State with 20 days notice of Berryman's discharge, and with any reviews of Berryman's care and treatment pursuant to the Act.<sup>127</sup> The superintendent or attending physician was also required to file quarterly reviews of Berryman's treatment with the trial court, and to provide notice to the State of those reviews.<sup>128</sup> An amendment to the commitment order also required the superintendent or attending physician to provide notice of Berryman's discharge to Teresa Krieger, Keith's surviving spouse.<sup>129</sup>

Berryman brought this case after the trial court granted the State's motion to disseminate the quarterly reviews of his treatment at Logansport State Hospital, which contained confidential mental health records, to Teresa Krieger, a third party.<sup>130</sup> The appellate court examined the relevant statutory provisions of the Voluntary and Involuntary Treatment of Mentally Ill Individuals Act and the Indiana Health Records Act,<sup>131</sup> as well as the legislative intent behind both Acts.<sup>132</sup> The court ultimately determined that the trial court's order that Berryman's quarterly reviews be disseminated to Teresa Krieger was deficient for three reasons.<sup>133</sup> First, Teresa Krieger herself did not file a petition requesting the release of the mental health records pursuant to the Indiana Health

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121. *Id.* at 1.

122. IND. CODE § 16-39-5-3 (2002).

123. 2002 Ind. Acts 44.

124. 797 N.E.2d 820 (2003).

125. *Id.* at 822.

126. IND. CODE § 12-26-7-1 to -5 (2003).

127. *Berryman*, 747 N.E.2d at 822.

128. *Id.*

129. *Id.*

130. *Id.*

131. IND. CODE § 16-39-2-1 to -9.

132. *Berryman*, 797 N.E.2d at 823-24.

133. *Id.* at 825.



Records Act.<sup>134</sup> Second, the trial court failed to find that other reasonable methods of obtaining these records were unavailable or ineffective, and that Teresa Krieger's need for the information outweighed the potential harm that disclosing his mental health records might cause Berryman.<sup>135</sup> Third, the trial court's dissemination order did not appropriately limit the disclosure of protected information in Berryman's medical records.

Indiana law requires that the superintendent of the hospital or the attending physician of an individual involuntarily committed for treatment of a mental disorder "shall file with the court a review of the individual's care and treatment."<sup>136</sup> In addition, the superintendent or attending physician must give notice of the review to the petitioner in the commitment proceeding and to "other persons that were designated by the court . . . ." <sup>137</sup> Nothing in the Voluntary and Involuntary Treatment of Mentally Ill Individuals Act requires the dissemination of the review to the petitioner or other persons designated by the court, but only notice of the review.<sup>138</sup>

The appellate court further noted that, without the consent of a patient, a court order is required for disclosure of the patient's medical record pursuant to the Indiana Health Records Act.<sup>139</sup> In so doing, the court established a clear legal standard for Indiana courts to use in evaluating whether to disclose a patient's medical records. An individual may petition the court for access to a patient's mental health record and shall be granted a hearing on that petition.<sup>140</sup> The court may find in favor the petitioner only if a preponderance of the evidence supports the conclusion that other reasonable methods of obtaining the information are neither available nor effective, and that the petitioner's need for disclosure outweighs the patient's potential harm.<sup>141</sup> In weighing the patient's potential harm, the court considers the impact of disclosure on the physician-patient privilege and the patient's rehabilitative process.<sup>142</sup> In ordering such disclosure, the trial court must protect the confidentiality of the patient's medical records by taking appropriate measures to limit the scope of the disclosure to those parts of the medical record that are essential to satisfy the order's purpose, and to limit dissemination to only those persons whose need for information forms the basis of the order.<sup>143</sup> Furthermore, the court must provide for any measures necessary to limit disclosure for the protection of the patient, the physician-patient privilege and the patient's rehabilitative process.<sup>144</sup>

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134. *Id.*

135. *Id.*

136. IND. CODE § 12-26-15-1(a) (1994).

137. *Id.* § 12-26-15-1(b).

138. *Id.*

139. *Berryman*, 797 N.E.2d at 824 (citing IND. CODE § 16-39-2-6 (1993)).

140. *Id.* (citing IND. CODE § 16-39-3-4).

141. *Id.* at 825.

142. *Id.* (citing IND. CODE § 16-39-3-7).

143. IND. CODE § 16-39-3-9.

144. *Id.*

## IV. ANTITRUST

## A. Price-Fixing

The Federal Trade Commission (FTC) entered into several consent orders during the period under survey, mostly dealing with physician-controlled networks allegedly fixing prices without being financially or clinically integrated. The orders demonstrate the FTC's increasing aggression against messenger-model<sup>145</sup> physician-hospital organizations (PHOs) and independent physician associations (IPAs), and the increasing scope of parties involved in the FTC's inquiries.<sup>146</sup>

Recently, the FTC alleged that Carlsbad Physician Association, Inc., a PHO, violated the antitrust laws. The PHO represented approximately 75% of all physicians, and 80% of all primary care physicians, in the Carlsbad, New Mexico market.<sup>147</sup> The PHO was intended to operate a messenger model for its members, but according to a consent decree the entity's only purpose was to allow the member physicians to collectively bargain with health plans in order to obtain "favorable reimbursement" for members' services.<sup>148</sup> This consent order is notable because, in addition to the PHO itself, the organization's executive director and certain members of the Board's contract committee were named and agreed to specific personal obligations and requirements.<sup>149</sup> In addition, the FTC included the unusual requirement that the PHO be dissolved to prevent its misuse in the future.

Two additional consent orders reflect the expanding scope of the FTC's perception of PHO's anticompetitive conduct. The FTC alleged that the Maine Health Alliance and its executive director William R. Diggins operated a PHO network that engaged in anticompetitive collusion and fixed prices in Northeast Maine.<sup>150</sup> The Alliance represented 325 physicians and eleven hospitals, and was involved in contracts for both hospital services and physician services. This is

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145. A messenger model network employs a third party to act as a courier of payor offers and physician acceptance or rejection. The courier should be neutral with respect to adequacy of price and related terms. Where the messenger is controlled by its physician members, however, the FTC believes that the messenger's neutrality is compromised and the potential for collusion is heightened. *See generally infra* note 174.

146. As noted by one commenter, "non-integrated, provider-controlled contracting networks purporting to operate as messenger arrangements but which in actuality are fixing prices [must be corrected] so they comply with section 1 of the Sherman Act." John Miles, *Ticking Antitrust Time Bombs: A Message to Messed up Messenger Models*, HEALTH LAWS. NEWS 5 (2002) (discussing the perils messenger models currently face).

147. Carlsbad Physician Ass'n, Inc., 68 Fed. Reg. 25,374 (F.T.C. May 12, 2003) (consent order entered June 13, 2003).

148. *Id.*

149. *Id.*

150. Me. Health Alliance, 68 Fed. Reg. 43,515 (F.T.C. July 23, 2003) (consent order entered Aug. 27, 2003).



a particularly notable consent order because it represents the first FTC action alleging charges that a PHO engaged in price fixing or anticompetitive collusive conduct in the provision of *hospital* services in addition to physician services. Less than two months later, the FTC entered into a similar consent order with South Georgia Health Partners, L.L.C.,<sup>151</sup> a PHO, along with its five owner PHO's and three associated IPA's. South Georgia Health Partners represented fifteen member hospitals and approximately 500 physicians (approximately 90% of all physicians) in a large portion of Southern Georgia, and allegedly collectively negotiated contracts for both hospital and physician services.<sup>152</sup> Following the logic in the Maine Health Alliance consent order,<sup>153</sup> the FTC alleged that the PHO conducted collective negotiations with payors, and that the members refused to deal with payors individually, constituting price-fixing and anticompetitive collusive conduct with respect to both physician and hospital services.<sup>154</sup>

In several other actions undertaken during the survey period, the FTC determined that other networks that purported to operate physician-controlled messenger model networks instead served as vehicles for naked price-fixing, including the following:

- (1) SPA Health Organization, a purported messenger model PHO representing approximately 1000 physicians in the Dallas/Fort Worth, Texas area, executed a consent order for alleged anticompetitive collective bargaining as to third-party payor contracts.<sup>155</sup>
- (2) The FTC formally charged California Pacific Medical Group, Inc., d/b/a Brown and Toland Medical Group, with anticompetitive conduct and price fixing.<sup>156</sup> Brown and Toland is a multi-specialty IPA with more than 1500 members practicing in the San Francisco, California area.<sup>157</sup> Brown and Toland settled the matter in February, 2004.
- (3) Grossmont Anesthesia Services Medical Group, Inc.,<sup>158</sup> and

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151. S. Ga. Health Partners, L.L.C., 68 Fed. Reg. 54,456 (F.T.C. Sept. 17, 2003) (consent order entered Oct. 31, 2003).

152. *Id.*

153. Me. Health Alliance, 68 Fed. Reg. 43,515 (F.T.C. July 23, 2003) (consent order entered Aug. 27, 2003).

154. S. Ga. Health Partners, L.L.C., 68 Fed. Reg. 54,456.

155. SPA Health Org., 68 Fed. Reg. 36,795 (F.T.C. June 19, 2003) (consent order entered July 17, 2003).

156. Cal. Pac. Med. Group, Inc., 69 Fed. Reg. 7,485 (F.T.C. Feb. 17, 2004) (complaint entered July 9, 2003).

157. *Id.*

158. Grossmont Anesthesia Servs. Med. Group, Inc., 68 Fed. Reg. 36,558 (F.T.C. June 18,

Anesthesia Service Medical Group, Inc.,<sup>159</sup> with approximately 180 physicians in San Diego County, California, entered into a consent order with the FTC for purportedly colluding to fix prices against Grossmont Hospital and to extract an on-call stipend for the groups' members.

- (4) The FTC executed a consent order with Washington University Physician Network, a purported messenger-model PHO representing approximately 1500 physicians in greater metropolitan St. Louis, Missouri, for the PHO's alleged price-fixing.<sup>160</sup>
- (5) Physician Network Consulting, L.L.C., a negotiating agent for Professional Orthopedic Services, Inc., an IPA, the agent's managing director, the IPA itself (a purported messenger-model network representing 28 orthopedic specialists in the Baton Rouge, Louisiana area), and the IPA's three member physician practices, allegedly engaged in naked price-fixing in negotiations with health insurance payors and other third-party payors.<sup>161</sup>
- (6) North Texas Specialty Physicians, a group of approximately 600 physicians in the Fort Worth, Texas area, allegedly fixed prices by polling members to determine the minimum acceptable fees each would accept, establishing minimum fees the group would collectively accept based on averages computed from the polling data, and negotiating price and price-related terms on behalf of the member physicians.<sup>162</sup>
- (7) Finally, according to the FTC's consent order, Surgical Specialists of Yakima consisting of two physician groups and 24 physicians practicing in five surgical specialties, representing 90% of all general surgery physicians in the Yakima, Washington area, allegedly engaged in anticompetitive collective bargaining. This consent order is particularly notable in that the FTC required as part of the consent order that the group revoke the membership of its two group practice members.<sup>163</sup>

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2003) (consent order entered July 11, 2003).

159. Anesthesia Serv. Med. Group, Inc., 68 Fed. Reg. 36,557 (F.T.C. June 18, 2003) (consent order entered July 11, 2003).

160. Wash. Univ. Physician Network, 68 Fed. Reg. 43,517 (F.T.C. July 23, 2003) (consent order entered Aug. 22, 2003).

161. Physician Network Consulting, L.L.C., 68 Fed. Reg. 44,337 (F.T.C. July 28, 2003) (consent order entered Aug. 27, 2003).

162. N. Tex. Speciality Physicians, No. 9312, 2003 WL 22168992 (F.T.C. Sept. 16, 2003) (complaint issued).

163. Surgical Specialists of Yakima, P.L.L.C., File No. 021 0242, 2003 WL 22225615 (F.T.C.



In each of these cases, the FTC determined that the physicians' practices were not sufficiently financially or clinically integrated to justify the network's collective bargaining on behalf of its physician members. The clinical integration concept was discussed in an FTC advisory opinion issued in response to a request from MedSouth, Inc., a Denver, Colorado IPA.<sup>164</sup> The MedSouth advisory opinion was the first such opinion to approve collective bargaining on the basis of clinical integration. The FTC has not since issued any additional opinions approving a clinically integrated physician practice.

In contrast to the allegations in the FTC consent order with the North Texas Specialty Physicians,<sup>165</sup> the FTC issued an advisory opinion to Bay Area Preferred Physicians regarding the development of a "standing offer" messenger model—the first time the FTC has approved of such an arrangement.<sup>166</sup> In fact, just one week earlier the FTC filed its complaint against North Texas Specialty Physicians for operating an allegedly effective standing offer messenger model network.<sup>167</sup> Six county medical societies in the San Francisco Bay area of Northern California obtained FTC approval to form a nonprofit mutual benefit corporation called Bay Area Preferred Physicians ("BAPP"), representing approximately 1,300 physicians (or roughly 13% of all physicians) practicing in a seven-county region.<sup>168</sup> BAPP will have non-exclusive representation of the participating physicians, allowing them to negotiate individually with payors.<sup>169</sup> Under a traditional messenger model, a messenger is expected to communicate payors' offers to providers and providers' acceptance or rejection back to payors,<sup>170</sup> but BAPP's messenger function will differ from the norm.

The FTC approved a so-called "standing offer" messenger model, in which a BAPP non-physician employee will collect minimum payment information from each physician member individually "in a way that does not suggest the price level that the doctor should select," and will maintain the confidentiality of that information.<sup>171</sup> The messenger will have a power of attorney to accept contracts on behalf of any physician where the payor's offer is greater than or equal to the physician's stated minimum, and will provide the remaining network members an opportunity to "opt in" to that contract by delivering the payor's offer to those physicians whose minimum price is greater than that offered by the

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Sept. 24, 2003) (consent order).

164. MedSouth, Inc., 2002 WL 463290 (F.T.C. Feb. 19, 2002) (advisory opinion).

165. *N. Tex. Specialty Physicians*, 2003 WL 22168992; see also *Tenet Healthcare Corp.*, File No. 0210119, 2003 WL 23025349 (F.T.C. Dec. 22, 2003) (complaint and consent order) (alleging PHO's use of collusive fee schedule constituted price fixing).

166. *Bay Area Preferred Physicians*, 2003 WL 22207195 (F.T.C. Sept. 23, 2003) (advisory opinion).

167. *N. Tex. Specialty Physicians*, 2003 WL 22168992.

168. *Bay Area Preferred Physicians*, 2003 WL 22207195, at \*1, \*7.

169. *Id.* at \*2.

170. Miles, *supra* note 146, at 6.

171. *Bay Area Preferred Physicians*, 2003 WL 22207195, at \*2.

payor.<sup>172</sup> In the event that the offer is equal to or greater than the minimum prices of fewer than 50% of the group's physicians, BAPP's messenger will so notify the payor, and the payor may seek to contract directly with the providers or may increase and resubmit its offer.<sup>173</sup> Presumably the messenger would also have the authority to inform the payor how many physicians would accept its offer at different price levels (as each price level could be viewed as a separate offer) to facilitate the payor's ability to develop a network panel of sufficient scope to serve its beneficiaries. However, the BAPP advisory opinion is silent on this point.<sup>174</sup>

### *B. Antitrust and Physician Credentialing*

In *Poliner v. Texas Health Systems*,<sup>175</sup> a physician's antitrust and unfair practices claims were disposed of on summary judgment.<sup>176</sup> A peer review committee, acting on quality of care concerns, temporarily suspended Dr. Poliner's cardiac catheter lab and echocardiography privileges at Texas Health Systems, d/b/a Presbyterian Hospital of Dallas.<sup>177</sup> Dr. Poliner, alleging anticompetitive conduct, sued the hospital and several physicians who were involved in the peer review process that led to the suspension.<sup>178</sup> The court took notice that the suspension was applicable to Dr. Poliner's privileges at only one of eight hospitals, and found no evidence of conspiracy and, more importantly, no showing of harm to competition in any market.<sup>179</sup> Because Dr. Poliner made no showing that the relevant market should be limited to Presbyterian Hospital of Dallas, or that the named defendants had market power or the ability or opportunity to dominate or monopolize a market broader than the hospital itself, the court ruled that the undisputed facts in the case did not state a case under the antitrust laws.<sup>180</sup>

### *C. "Own-Use" Limitations*

In two advisory opinions issued in 2003, *Arkansas Children's Hospital*,<sup>181</sup> and *Valley Baptist Medical Center*,<sup>182</sup> the FTC ruled on the applicability of the

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172. *Id.*

173. *Id.*

174. Cf. U.S. DEP'T OF JUSTICE & FED. TRADE COMM., STMTS. OF ANTITRUST ENFORCEMENT POLICY ON HEALTH CARE 106 (1996), STMT. 9: Enforcement Policy on Multiprovider Networks, available at <http://www.ftc.gov/reports/hlth3s.pdf> (last visited Mar. 16, 2004).

175. No. Civ.A.3:00CV-1007-P, 2003 WL 22255677 (N.D. Tex. Sept. 30, 2003).

176. *Id.* at \*2.

177. *Id.*

178. *Id.*

179. *Id.* at \*6-7.

180. *Id.* at \*7.

181. 2003 WL 1257421 (F.T.C. Mar. 13, 2003) (advisory opinion).

182. 2003 WL 1257423 (F.T.C. Mar. 13, 2003) (advisory opinion).



Non-Profit Institutions Act<sup>183</sup> (“NPIA”) to hospitals’ sales of pharmaceuticals. The NPIA exempts hospitals and certain other non-profit institutions from the Robinson-Patman Antidiscrimination Act with respect to supplies the institutions purchase for their “own use.”<sup>184</sup> The advisory opinions revisit the seminal Supreme Court decision in *Abbott Laboratories v. Portland Retail Druggists Ass’n*,<sup>185</sup> brought by retail pharmacies alleging unfair competition from a hospital’s discounted resale of pharmaceuticals it purchased at a discount.

As the Court held in *Abbott Labs*, the exception provided under the NPIA is a narrow one and does not apply universally to all of a hospital’s pharmaceutical purchases.<sup>186</sup> The statutory phrase “for its own use” was intended to apply only where pharmaceuticals were purchased for “use *by the hospital* in the sense that such use is a part of and promotes the hospital’s intended institutional operation in the care of persons who are its patients.”<sup>187</sup> Ultimately, the Court held that the exception generally did not apply to drugs the hospital dispensed to walk-in patients, non-hospital patients, and former patients.<sup>188</sup> Thus, a hospital’s purchase of pharmaceuticals for resale to individuals in these categories is not protected under the NPIA.

These FTC advisory opinions addressed new issues relating to hospitals’ sales of pharmaceuticals.

1. *Arkansas Children’s Hospital*.—In the *Arkansas Children’s Hospital* opinion, the FTC addressed a question of first impression as to whether the requesting hospital (Arkansas Children’s Hospital, or “ACH”), a not-for-profit organization, may acquire pharmaceuticals for resale directly to the patients of the University of Arkansas for Medical Services (“UAMS”), which is also not-for-profit.<sup>189</sup> ACH and UAMS are academically affiliated and clinically coordinated, and a significant number of UAMS medical personnel work at ACH.<sup>190</sup> Both ACH and UAMS operate outpatient clinics on the ACH campus, and ownership of these clinics is indistinguishable.<sup>191</sup> In addition, a significant number of patients are treated at both ACH and UAMS clinics.<sup>192</sup> Prior to the advisory opinion, ACH only filled prescriptions from ACH physicians; patients seeking to fill prescriptions from UAMS physicians would have to go to the UAMS’ outpatient pharmacy.<sup>193</sup>

The FTC concluded that the ACH pharmacy could acquire pharmaceuticals for resale directly to UAMS physicians’ patients without violating the “own use”

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183. 15 U.S.C. § 13(c) (2003).

184. *Id.*

185. 425 U.S. 1 (1976).

186. *Id.* 13-14.

187. *Id.* at 14 (emphasis added).

188. *Id.* at 14-18.

189. 2003 WL 1257421, at \*1 (F.T.C. Mar. 13, 2003) (advisory opinion).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

requirement of the NPJA.<sup>194</sup> Because of the transparent ownership distinctions between ACH and UAMS clinics and common purpose to care for the same patient population, and recognizing the inconvenience and confusion to the patients caused by ACH's pharmacy's prohibition against prescriptions written by UAMS physicians, the FTC concluded that the parties had formed "a joint venture to care for pediatric patients at the full range of outpatient clinics operated on the ACH campus."<sup>195</sup> Although the facts are very specific in the *Arkansas Children's Hospital* opinion, the analysis helps illuminate the FTC's posture regarding the analysis of joint enterprises under the NPJA.

2. *Valley Baptist Medical Center*.—The inquiry in Valley Baptist Medical Center's ("VBMC's") request focused on the status of contract employees.<sup>196</sup> VBMC has some 200 independent contractors (food and laundry service workers) who are not covered by the hospital's health or retirement benefits.<sup>197</sup> VBMC's management wanted to dispense discounted pharmaceuticals to its contract workers, but in *Abbott Labs*, although the Court determined that a hospital's purchase of pharmaceuticals for resale to its employees was exempt under the NPJA, it was silent as to independent contractors.<sup>198</sup> The FTC noted that the Court concluded "that employees are necessary for the hospital to function and that providing them with pharmaceuticals enhances the hospital's operation."<sup>199</sup>

Compelled by the Supreme Court's rationale in the *Abbott Labs* opinion that the existence of an "obvious and institutionally intimate" relationship between [certain non-employees] and the hospital's purposes and activities" caused the two groups to be equal for NPJA analysis, the FTC determined that VBMC's contract workers played a role equivalent to its employees.<sup>200</sup> The contract workers were exclusively assigned to VBMC, worked on VBMC's premises, and in many instances worked for VBMC for very long periods of time.<sup>201</sup> Because the contract workers' functions were integral to VBMC's operations, and because VBMC had asserted "plausible reasons" why the dispensation of pharmaceuticals to the contractors would directly benefit the hospital through increased productivity, the FTC concluded that VBMC's contract workers were equivalent to employees under the *Abbott Labs* analysis, and that VBMC's purchase of pharmaceuticals for resale directly to its independent contractors would be for the hospital's "own use" under the NPJA.<sup>202</sup>

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194. *Id.* at \*3.

195. *Id.*

196. 2003 WL 1257423, at \*1 (F.T.C. Mar. 13, 2003) (advisory opinion).

197. *Id.*

198. 425 U.S. 1, 16 (1976).

199. *Valley Baptist Med. Ctr.*, 2003 WL 1257423, at \*2.

200. *Id.* at \*3.

201. *Id.*

202. *Id.*



#### *D. Evolution of Physician/Hospital Competition*

A hospital's governing body may prefer that the members of its medical staff be loyal and refer their patients only to the hospital at which they have clinical privileges. Some physicians have philosophical differences with such expectations, and believe that they can furnish better quality patient care or better access to care by creating a specialty facility focused on one or more discrete areas of medical expertise, or even creating an entire full-service hospital. These physicians may themselves invest in the hospital or specialty facility, and as a consequence divert their patients to their own entity rather than the hospital at which they have clinical privileges. Some detractors believe that, due to their investment in the entity, such physicians have an economic incentive to refer patients to their entity,<sup>203</sup> although lawmakers are not unanimous in that belief and recognize that many physicians are offended by the suggestion that economics affect their medical judgment.<sup>204</sup> Regardless, when members of a hospital's medical staff introduce a competitor to the hospital, the result will be increased competition, and the hospital may look for ways to protect against patient loss.

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203. See, e.g., Medicare Prescription Drug, Improvement, and Modernization Act of 2003 § 507 (amending 42 U.S.C. §§ 1395nn(d)(3), (h)(7) (2003)) (imposing an eighteen-month moratorium on specialty hospitals' use of the Stark law's "whole hospital" or "rural hospital" exceptions); Introduction of the Hospital Investment Act, 149 CONG. REC. E634-35 (daily ed. Apr. 1, 2003) (statement of Rep. Stark). Rep. Stark explained his:

concern that these specialty hospitals are skirting the spirit of the physician self-referral laws [and have] great potential for conflicts-of-interest for physicians who may be induced to base their treatment decisions on profits generated by the facility rather than on the clinical needs of their patients. . . . The investors in these joint ventures and specialty hospitals skim the profits off full-scale hospitals of their most profitable business, leaving those existing hospitals much worse off financially.

*Id.*

204. See, e.g., *Hearing Before the Subcomm. on Health of the Comm. on Ways and Means, House*, 106th Cong. 34 (1999) (statement of Rep. McCrery) (stating that "courts should hold . . . the Government to a high standard in proving its [Antikickback Statute] case. Maybe we should . . . not assum[e] that all physicians [self-refer] to make the maximum amount of money. Not all physicians are crooks."); *id.* at 54 (statement of K. Buto, Dep. Dir., Center for Health Plans and Providers, Health Care Fin. Admin.) ("We are assuming that the providers are complying with the [Stark] statute."); *id.* (statement of Rep. Thomas) ("I honestly think the genesis of this legislation was exactly the opposite of the statement that [K. Buto] just made. That, in fact, [Rep. Stark believes] health care professionals, by and large, are crooks."); *id.* at 79-80 (statement of Rep. Thomas). Rep. Thomas stated:

[Lawmakers] simply compared volume [of procedures by self-referring physicians] and drew a conclusion that they were crooks. . . . I don't think that is fair. But that is exactly the methodology that was used as outlined to justify this law. . . . We will catch the crooks. What we ought not to do is put up a net that prohibits responsible, reasonable, and appropriate delivery of care.

*Id.*

The health care marketplace is seeing growing competition between hospitals and their medical staff members' private ventures.<sup>205</sup> In Indianapolis, this phenomenon is evidenced by the development of specialty cardiac hospitals such as the Heart Center of Indiana (a joint venture of St. Vincent Health and cardiologist-owned The Care Group) and The Indiana Heart Hospital (a joint venture of Community Hospital Network and physician-owned Indiana Heart Associates).<sup>206</sup> The specialty hospitals will compete for patients in the greater metropolitan Indianapolis area, and in the case of the Heart Center of Indiana will compete against the hospital partner in the joint venture.<sup>207</sup> Indianapolis is also home to the Krannert Institute of Cardiology, a hospital-in-a-hospital housed within Riley Children's Hospital and owned by Riley, Methodist and Indiana University hospitals, and soon St. Francis Hospital & Health Centers will complete its cardiac facility in southern Indianapolis.<sup>208</sup> Physicians in Indiana also have invested in whole hospitals, such as the recently announced Arnett Clinic's 150-bed, \$100 million full-service hospital to be opened in Lafayette, Indiana, by the fall of 2005.<sup>209</sup>

1. *Use of Exclusive Contracts.*—A hospital might respond to physician competition by entering into an exclusive contract with one or more dominant payors with respect to the specialty served by the physician venture. For example, in 2001, two cases were filed in response to hospitals' retaliatory actions against medical staff members with investments in facilities competing with the hospitals: *Surgical Care Center, L.L.C. v. Hospital Service District No. 1*,<sup>210</sup> and *Rome Ambulatory Surgery Center, L.L.C. v. Rome Memorial Hospital*.<sup>211</sup> Where a hospital retaliates against its medical staff for undertaking competitive ventures, the antitrust laws are implicated.

a. *Surgical Care Center.*—In *Surgical Care Center*,<sup>212</sup> a hospital's surgeons built an ambulatory surgery center, in response to which the hospital allegedly negotiated exclusive contracts with payors to freeze the competition out and generally refused to cooperate with the center.<sup>213</sup> The court held that the hospital's conduct was neither predatory nor unlawful, as it found no monopolization or attempted monopolization over the surgery marketplace because the hospital lacked market power.<sup>214</sup> The court justified the hospital's

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205. M. Norbut, *Battle of the Beds*, AM. MED. NEWS, May 5, 2003 (discussing Indianapolis as a "perfect example of the rise of specialty hospitals . . .").

206. *Id.*

207. *Id.*

208. *Id.*

209. K. Cullen, *Hospitals Chief: Rivals Won't Steer Our Strategy*, J. & COURIER (Lafayette, Ind.), Dec. 16, 2003; K. Cullen, *Physician Group Gives Hospital Venture a Shot*, J. & COURIER (Lafayette, Ind.), Dec. 28, 2003.

210. 2001-1 Trade Cas. (CCH) 73,215 (E.D. La. 2001).

211. No. 01-CV-002 (N.D.N.Y. Jan. 3, 2001).

212. 2001-1 Trade Cas. (CCH) 73,215 (E.D. La. 2001).

213. *Id.*

214. *Id.*



use of exclusive contracts by taking note of the physicians' economic incentive to steer patients to their ambulatory surgery center.<sup>215</sup>

b. *Rome Ambulatory Surgery Center*.—The *Rome Ambulatory Surgery Center* case, unlike *Surgical Care Center*, is still an active case.<sup>216</sup> The facts are similar to those in *Surgical Care Center*, but the physician investors in the Rome Ambulatory Surgery Center also alleged that the hospital threatened to take adverse action against the physicians' clinical privileges, and took other steps to dissuade physicians from referring patients to the surgery center and away from the hospital.<sup>217</sup> It will be interesting to follow *Rome Ambulatory Surgery Center* to learn how the court will apply the antitrust laws to Rome Hospital's credentialing activities.

2. *Economic Credentialing*.—Hospitals have also responded to physician competition by taking, or threatening, adverse action against the clinical privileges the competing physicians enjoy at the hospital, known colloquially as "economic credentialing."<sup>218</sup> Recently, an Ohio trial court heard *Walborn v. UHHS/CSAHS-Cuyahoga, Inc.*,<sup>219</sup> in which Dr. Walborn and other doctors alleged that St. John West Shore Hospital ("St. John") had implemented an unlawful credentialing policy.<sup>220</sup> Approximately ten months before the plaintiffs filed suit, St. John had announced a new "Medical Staff Development Plan" under which "staff members who 'have entered into employment agreements with competing health systems . . . or whose medical practice is managed by a competing health system which results in a material conflict of interest will not be eligible for appointment or reappointment to [St. John's] Medical Staff.'"<sup>221</sup> Physicians applying for clinical privileges at St. John would be required to notify the hospital of their employment relationships.<sup>222</sup>

St. John's separate credentialing policy identifies two classes of physicians ineligible for application or reapplication to the Hospital's medical staff: individuals with a "material financial relationship" and individuals with a "material conflict of interest."<sup>223</sup> Evidence adduced at trial indicated that St. John's credentialing policy was intended to ensure the long-term viability of St. John and its affiliate St. Vincent Hospital, and to improve the quality of care

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215. *Id.*

216. No. 01-CV-002 (N.D.N.Y. Jan. 3, 2001).

217. *Id.*

218. See, e.g., J. Blum, *Evaluation of Medical Staff Using Fiscal Factors: Economic Credentialing*, 26 J. HEALTH & HOSP. LAW 3, 65 (Apr. 1993); J. Blum, *Exclusive Contracting: The Original Economic Credentialing*, 26 J. HEALTH & HOSP. LAW 4, 65 (May 1993); T. Hudson, *Factoring in the Financials: Court Gives Nod to Economic Credentialing*, HOSPITALS 36 (Apr. 5, 1993).

219. No. CV-02-479572, slip op. (Ct. Com. Pl. June 16, 2003).

220. *Id.*

221. *Id.* at \*3.

222. *Id.*

223. *Id.*

at both hospitals.<sup>224</sup> Further, the credentialing policy was intended to apply certain quality initiatives established by the hospitals' owners to St. John and St. Vincent.<sup>225</sup> The court held that such goals are reasonably related to the operation of a hospital.<sup>226</sup>

The plaintiff physicians were notified by St. John that requests for application for reappointment to the medical staff that they had submitted were being denied because of a material financial interest with a competing health system, which is in conflict with the hospital's conflict of interest credentialing policy.<sup>227</sup> Although the notice informed the plaintiffs that they had a right to an administrative hearing, and although the plaintiffs requested such a hearing on at least two occasions, no such hearing ever took place.<sup>228</sup>

St. John was criticized because the hospital did not track or enforce the material conflict of interest provision of its credentialing policy, a fact that St. Johns admitted.<sup>229</sup> In fact, St. John admitted it has physicians on its staff that would fall within the material conflict of interest criteria, and who are responsible for large numbers of admissions at the hospital.<sup>230</sup> The court found that St. John's medical staff was never asked to adopt the credentialing policy, and that the credentialing policy was materially in conflict with the medical staff bylaws concerning physician credentialing.<sup>231</sup> The court also found that the plaintiffs were actively diverting patients away from St. John and to a facility with which the plaintiffs had a financial relationship, and that in many cases patients were referred to facilities farther from their communities than St. John Hospital.<sup>232</sup>

The court found that whether a hospital board may enact policies that restrict medical staff membership on the basis of a physician's conflict of interest was a question of first impression under Ohio law.<sup>233</sup> Despite the fact that the hospital enforced its credentialing policy haphazardly, the court declined to enjoin enforcement of the policy.<sup>234</sup> Although Ohio law prohibits a hospital from discriminating against an applicant on the basis of the individual's certification or licensure, the court determined that the St. John credentialing policy used other factors to exclude individuals: the applicants' financial interest or employment relationships.<sup>235</sup> Because St. John's credentialing policy made no

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224. *Id.*

225. *Id.*

226. *Id.* at 8.

227. *Id.*

228. *Id.*

229. *Id.* at 9.

230. *Id.* at 10.

231. *Id.* at 11.

232. *Id.* at 21.

233. *Id.* at 24.

234. *Id.* at 25.

235. *Id.* at 27.



distinction based on the plaintiff's certification or licensure; the policy did not violate Ohio law.<sup>236</sup> Ultimately, the court found that

given the competitive market for healthcare, as well as the facts adduced regarding the business practices [of plaintiffs], the [c]ourt finds that St. John's adoption and implementation [sic] the credentialing policy was not arbitrary or capricious therefore, the [c]ourt will not substitute its judgment for that of St. John. The [c]ourt concludes the credentialing policy is a valid corporate policy that could be applied to every physician requesting privileges at the Hospital.<sup>237</sup>

3. *Bundling*.—The concept of “bundling” is commonplace in many industries such as telecommunication, but is a recent addition to the competitive practices between hospitals and physician ventures.<sup>238</sup> Bundling refers to multi-product discount arrangements in which buyers receive a price discount on a package of services that, if purchased separately, would not be discounted.<sup>239</sup> A health care provider may bundle its full scope of services a health care provider offers to offer a payor a discount.<sup>240</sup> Bundling may be used as a competitive or anticompetitive tool by offering a payor an attractive discount over a broad range of services, provided the payor will refuse to contract with the provider's competitors.<sup>241</sup> If or when bundling is anticompetitive and in violation of the Sherman Act is yet to be decided.

a. *McKenzie-Willamette v. PeaceHealth*.<sup>242</sup>—An independently owned hospital in Eugene, Oregon, McKenzie-Willamette Hospital, won a \$16.2 million jury verdict October 31 in an antitrust lawsuit against PeaceHealth, which owns Sacred Heart Hospital—the only other major hospital in the area.<sup>243</sup> PeaceHealth also owns two smaller hospitals in Lane County, in which Eugene is located.<sup>244</sup>

At trial, the jury found that PeaceHealth had attempted to monopolize the Lane County hospital services market in violation of the antitrust laws. It also found for McKenzie-Willamette Hospital on two state claims, one alleging

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236. *Id.*

237. *Id.* at 31.

238. See, e.g., C. Stern, *Comcast Bundles TV, Internet to Keep Customers*, WASH. POST, Mar. 26, 2003, at G1 (describing internet access fee increase for subscriber who do not also purchase cable television services from same vendor).

239. See, e.g., *Group Purchasing Organizations: Use of Contracting Processes and Strategies to Award Contracts for Medical-Surgical Products: Hearing Before Sen. Subcomm. on Antitrust, Competition Policy, and Consumer Rights, Comm. on the Judiciary*, 108th Cong. 6 (2003) (statement of Marjorie Kanef, Director, Health Care-Clinical and Military Health Care Issues, U.S. Gen. Acctg. Office).

240. *Id.*

241. *Id.*

242. No. 02-6032-HA (D. Or. Oct. 31, 2003).

243. *Id.* at 1-2, 4-5.

244. *Id.* at 4-5.

discriminatory pricing and one alleging wrongful interference.<sup>245</sup> The jury determined that McKenzie-Willamette Hospital had suffered \$5.4 million in damages, but under the applicable antitrust remedy of treble compensatory damages will receive \$16.2 million.<sup>246</sup> The hospital may also be awarded attorneys' fees and expenses of \$2 million to \$4 million.<sup>247</sup>

McKenzie-Willamette alleged that PeaceHealth used its monopoly in cardiovascular and neonatal care to negotiate an exclusive agreement with Regence Blue Cross and Blue Shield of Oregon, the major insurer in the Lane County market (insuring approximately one-third of the County population).<sup>248</sup> Because McKenzie-Willamette did not furnish cardiovascular and neonatal services, PeaceHealth was able to offer the payor a total package discount with which McKenzie-Willamette could not compete. McKenzie-Willamette alleged that PeaceHealth offered Regence two pricing schemes, one that permitted the payor to contract with McKenzie-Willamette, and one that did not.<sup>249</sup> Under the scheme that allowed Regence patients to go to McKenzie-Willamette, PeaceHealth charged more for cardiovascular and neonatal services.<sup>250</sup> If Regence patients were not eligible for coverage at McKenzie-Willamette, PeaceHealth offered a greater discount on its cardiovascular and neonatal services.<sup>251</sup>

A hearing is to be scheduled to hear PeaceHealth's motion to set the verdict aside and to hear arguments on motions by McKenzie-Willamette for injunctive relief.

b. *LePage's Inc. v. 3M*.<sup>252</sup>—While not a health care case, *LePage's* is an important development in antitrust enforcement relating to bundling. "LePage's brought this antitrust action asserting that 3M used its monopoly over its Scotch tape brand to gain a competitive advantage" over private label tape wholesalers.<sup>253</sup> LePage's asserted that 3M used a "bundled rebate" to offer retailers greater financial incentives if the retailers purchased products in several of 3M's product lines, and that offering such financial incentives constituted an improper use of its monopoly power.<sup>254</sup> LePage's is a private label tape wholesaler that competes with 3M, and in its complaint alleged that 3M offered cash payments, promotional allowances, and other cash incentives in exchange for exclusive dealing arrangements with 3M.<sup>255</sup>

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245. *Id.* at 12.

246. *See* 11 HEALTH L. REV. 247 (2002).

247. *Id.*

248. *McKenzie-Willamette*, No. 02-6032-HA, at 8-11.

249. *Id.* at 6.

250. *Id.*

251. *Id.*

252. 324 F.3d 141 (3d Cir. 2003) (en banc); *petition for cert. filed*, 124 S. Ct. 365 (2003) (mem.).

253. *LePage's*, 324 F.3d at 145.

254. *Id.*

255. *Id.*



LePage's alleged causes of action "for unlawful agreements in restraint of trade under § 1 of the Sherman Act,<sup>256</sup> monopolization and attempted maintenance of monopolization under § 2 of the Sherman Act,<sup>257</sup> and exclusive dealing under § 3 of the Clayton Act."<sup>258</sup> In the lower court, the jury awarded LePage's damages of \$22,828,899 on its claims based on monopolization and attempted monopolization.<sup>259</sup> The jury decided against LePage's on its claims under § 1 of the Sherman Act and § 3 of the Clayton Act.<sup>260</sup>

The district court ruled as a matter of law against LePage's on its "attempted maintenance of monopoly power" claim but denied the remainder of 3M's motion and denied its motion for new trial.<sup>261</sup> The district court awarded LePage's damages of \$68,486,697 plus interest.<sup>262</sup> Both 3M and LePage's appealed.<sup>263</sup>

On appeal, 3M conceded that it used exclusive contracts, but argued that such conduct was legal, as a matter of law, because 3M never priced its tape below cost.<sup>264</sup> 3M adopted the posture that "'if the big guy is selling above cost, it has done nothing which offends the Sherman Act. . . .'"<sup>265</sup> The Third Circuit Court examined more than eighty years of Supreme Court decisions under § 2 of the Sherman Act, ultimately determining that "nothing that the Supreme Court has written since *Brooke Group* dilutes the Court's consistent holdings that a monopolist will be found to violate §2 of the Sherman Act if it engages in exclusionary or predatory conduct without a valid business justification."<sup>266</sup>

With one judge dissenting, the *en banc* circuit court held that "[t]here was ample evidence that 3M used its market power over transparent tape, backed by its considerable catalog of products, to entrench its monopoly to the detriment of LePage's, its only serious competitor, in violation of § 2 of the Sherman Act."<sup>267</sup> As the panel found no reversible error, the circuit court affirmed the district court.<sup>268</sup>

Arguably, the rationale of the decision in *LePage's* could apply to bundling in the health care context. For example, where a full-service hospital offers a discount to a payor across its entire product line, a specialty competitor may be disadvantaged by the market power of the hospital. The specialty provider would find it impracticable, if not impossible, to discount its prices sufficiently to

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256. 15 U.S.C. § 1 (2002).

257. *Id.* § 2.

258. *Id.* § 12.

259. *LePage's*, 334 F.3d at 145.

260. *Id.*

261. *Id.* (citing *Le Page's Inc. v. 3M*, 2000 WL 280350 (E.D. Pa. 2000)).

262. *Id.*

263. *Id.*

264. *Id.* at 147.

265. *Id.* (quoting transcript of oral argument, Oct. 30, 2002, at 11).

266. *Id.* at 152.

267. *Id.* at 169.

268. *Id.*

motivate a payor to reject the hospital's full-service scope discount. Query whether *LePage's* will be adopted in the context of health care antitrust analysis of bundling arrangements in cases such as *McKenzie-Willamette*.<sup>269</sup>

## V. TAX

### A. *Sarbanes-Oxley*<sup>270</sup>

The American Competitiveness and Corporate Accountability Act of 2002, commonly known as the Sarbanes-Oxley Act ("Sar-Ox") has imposed new duties on executives and directors of publicly traded companies concerning corporate governance and accountability since July 30, 2002. To recap, Sar-Ox regulates what boards must do to ensure that their company's "independent" auditors are truly independent.<sup>271</sup> It also creates and defines the role of a new federal entity—the Public Company Accounting Oversight Board, which is empowered to enforce standards for audits of public companies.<sup>272</sup> Sar-Ox also explains how to elect competent audit committee members and regulates adequate reporting procedures.<sup>273</sup> Finally, Sar-Ox calls for the creation of additional regulations and creates stringent enforcement measures for businesses, whether non-profit or for-profit concerning document destruction and protections for whistle-blowers.<sup>274</sup>

Immediately following its enactment, the Securities and Exchange Commission ("SEC") rapidly began implementation and enforcement of Sar-Ox. In the first half of 2003 alone, the SEC filed 72 enforcement actions involving financial fraud and reporting against public companies and sought to bar ninety-five dishonest corporate executives and directors from holding such positions with publicly traded companies.<sup>275</sup> A closer look at the enforcement activity of the SEC reveals that the first-ever enforcement action filed under Sar-Ox was against a publicly traded health care company, HealthSouth Corporation and its CEO, for irregularities in its financial statements.<sup>276</sup> Shortly thereafter, the Department of Justice brought criminal charges against HealthSouth's CFO, who pled guilty to several charges, including fraud and false certification of financial records.<sup>277</sup>

In response to the growing public scrutiny of all corporate actors and their dealings, in April 2003, the OIG, in conjunction with the American Health Lawyers Association ("AHLA"), published guidance under Sar-Ox for health

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269. *McKenzie-Williamette v. PeaceHealth*, No. 02-6032-HA (D. Or. Oct. 31, 2003).

270. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

271. *Id.* at tit. 2.

272. *Id.* at tit. 1.

273. *Id.* §§ 406-407.

274. *Id.* at tits. 8, 9, 11.

275. SEC Chairman William H. Donaldson, Speech to the National Press Club, Washington, D.C. (July 30, 2003).

276. *SEC v. HealthSouth Corp.*, No. CV-03-J-0615-S (N.D. Ala. Mar. 20, 1985).

277. Press Release, U.S. Dep't of Justice, HealthSouth Office Charged with Conspiracy to Commit Wire and Securities Fraud (Mar. 31, 2003) (on file with author).



care entities, regardless of their public, private or non-profit status.<sup>278</sup> The joint OIG/AHLA educational guidance poses several questions all health care entities should ask in light of Sar-Ox, concerning best governance practices. For example, some of the questions covered such topics as: structure of the health care entity's corporate compliance program, codes of conduct for the organization, policies and procedures governing compliance risk areas, and measures to prevent and respond to violations of the company's policies and procedures.<sup>279</sup>

These recent enforcement efforts under Sar-Ox and the OIG guidance are evidence of an increasing trend toward extending Sar-Ox's duties to all health care entities, regardless of their private or public status. For example, the New York State Attorney General, Elliott Spitzer, has publicly declared his desire for a state law that applies to non-profit corporations that mirrors Sar-Ox's federal compliance requirements for public corporations.<sup>280</sup> Moody's Investors Service may reflect not-for-profit hospitals' board governance in their bond ratings, through the use of a corporate compliance section in their bond rating methodology, similar to the new corporate governance ratings that apply to public companies.<sup>281</sup>

While Sar-Ox has had a direct and immediate impact on public corporations, its influence on non-profit and health care organizations has begun to be felt and will continue to increase over the years. Through legislative and judicial recognition of the universal principles governing honesty and fair play contained in Sar-Ox, all corporate actors—public, private and non-profit, especially health care—will need to pay significant attention further developments in this arena.

#### *B. St. David's Healthcare System, Inc. v. United States*<sup>282</sup>

St. David's Healthcare System, Inc. ("St. David's") has become the latest battleground for the Internal Revenue Service ("IRS") to attack certain transactions between tax-exempt organizations and for-profit entities.<sup>283</sup> In 1996, St. David's entered into a so-called whole hospital joint venture transaction with Columbia/HCA Healthcare Corporation ("HCA"), in which St. David's contributed all of its assets to a partnership in exchange for a minority ownership interest in the partnership.<sup>284</sup> In 1998, the IRS audited St. David's and the

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278. OIG, AHLA, CORPORATE RESPONSIBILITY AND CORPORATE COMPLIANCE: A RESOURCE FOR HEALTH CARE BOARDS OF DIRECTORS (2003).

279. *Id.*

280. New York Attorney General's Legislative Program, Program Bill # 02-03 (January 21, 2003).

281. Mary Chris Jaklevic, *Modern Healthcare: Rating Adjustment* (Dec. 1, 2003).

282. 349 F.3d 232 (5th Cir. 2003) ("*St. David's II*").

283. *See, e.g.,* Redlands Surgical Servs. v. Comm'r, 242 F.3d 904 (9th Cir. 2001) (per curiam); Rev. Rul. 98-15, 1998-1 C.B. 718; Rev. Rul. 69-545, 1969-2 C.B. 117; Gen. Couns. Mem. 39862 (Nov. 21, 1991).

284. *St. David's Health Care System, Inc. v. United States*, 2002 WL 1335230, at \*2 (W.D.

partnership, and ultimately revoked St. David's tax-exempt status in 2002 because, the IRS stated, once it entered into the partnership St. David's was no longer engaged in activities that primarily furthered a charitable purpose and thus it no longer qualified to be recognized as exempt under Section 501(c)(3) of the Internal Revenue Code.<sup>285</sup> St. David's paid the taxes the IRS alleged to be due under protest, then brought suit in district court for a refund.<sup>286</sup>

In district court, the IRS explained that St. David's should forfeit its exemption for two primary reasons. First, the partnership was not run by a community board.<sup>287</sup> Second, HCA received an impermissible private benefit from the partnership.<sup>288</sup> The district court granted St. David's motion for summary judgment, stating that "it is difficult to imagine a corporate structure more protective of an organization's charitable purpose than the one at issue in this case."<sup>289</sup> The district court also ordered the United States to pay St. David's reasonable litigation costs in the amount of \$951,569.83 and to refund \$103,000 "in taxes paid by St. David's for the 1996 tax year."<sup>290</sup>

The IRS appealed to the Fifth Circuit Court, arguing that the determinative issue is not whether the partnership was organized to protect St. David's charitable purposes, but whether St. David's ceased to engage primarily in activities to further St. David's charitable purposes when it ceded control of its operations to HCA.<sup>291</sup> St. David's countered that the issue is whether the partnership functioned in a manner that furthered St. David's exempt purpose.<sup>292</sup>

The court of appeals explained that the ultimate question is whether St. David's continued to operate exclusively in furtherance of an exempt purpose.<sup>293</sup> "Exclusively" in this context has been determined to mean "primarily," such that the partnership "cannot be deemed to operate exclusively *or primarily* for charitable purposes when a substantial portion of the organization's activities further non-charitable purposes."<sup>294</sup> The court explained that "[i]n order to

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Tex. 2002) ("St. David's I").

285. *Id.*; *St. David's II*, 349 F.3d at 234.

286. *St. David's II*, 349 F.3d at 234.

287. *St. David's I*, 2002 WL 1335230, at \*1.

288. *Id.*

289. *Id.* at \*8.

290. *St. David's II*, 349 F.3d at 234 (granting plaintiff's application for litigation costs).

291. *Id.* at 235.

292. *Id.*

293. *Id.* at 237.

[I]n determining whether an organization satisfies the operational test, we do not simply consider whether the organization's activities further its charitable purposes. We must also ensure that those activities do *not* substantially further other (non-charitable) purposes. If more than an "insubstantial" amount of the partnership's activities further the non-charitable interests, then St. David's can no longer be deemed to operate *exclusively* for charitable purposes.

*Id.* (emphasis added).

294. *Id.* at 237 n.6 (emphasis in original).



ascertain whether an organization furthers non-charitable interests, we can examine the structure and management of the organization. . . . In other words we look to which individuals or entities *control* the organization.”<sup>295</sup> To determine the issue of control, the circuit court looked to the partnership’s governing documents, which required it to be operated in accordance with the IRS community benefit standard.<sup>296</sup> The partnership agreement also provided that St. David’s and HCA each appointed one-half of the governing board.<sup>297</sup> St. David’s pointed out that the partnership agreement and management services agreement gave St. David’s various powers to ensure that the partnership was operated for charitable purposes, such as the power to terminate the CEO, to terminate the company hired to manage day-to-day operations, and to dissolve and liquidate the partnership under certain circumstances.<sup>298</sup> The Fifth Circuit concluded that these powers were not sufficient, as a matter of law, to ensure that St. David’s retained effective control over the partnership.<sup>299</sup>

First, the Fifth Circuit found that the form of the governing documents did not give St. David’s the power to control a majority of the partnership’s board, but merely a veto power.<sup>300</sup> “Thus, at best, St. David’s can prevent the partnership from taking action that might undermine its charitable goals; St. David’s cannot necessarily ensure that the partnership will take new action that furthers its charitable purposes.”<sup>301</sup>

Second, the court found that although Galen Health Care, Inc. (“Galen”), the for-profit subsidiary of HCA responsible for the partnership’s day-to-day management, was required under a management services agreement to abide by the IRS community benefit standard, it was a subsidiary of HCA and would naturally be inclined to prioritize HCA’s for-profit motives rather than St. David’s charitable purposes.<sup>302</sup> The court also indicated that St. David’s sole means of enforcement of this provision would be by taking legal action, a remedy so burdensome as to pull the teeth from St. David’s authority.<sup>303</sup>

Third, the court found that while St. David’s had the unilateral power to terminate the CEO of the partnership, St. David’s had already demonstrated the ineffectiveness of this power.<sup>304</sup> Although the partnership agreement required the CEO to file annual reports to the board with the amount of charity care provided by the partnership, the CEO had not prepared any such report, and St. David’s had not taken any punitive action against the CEO.<sup>305</sup>

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295. *Id.* at 237 (emphasis in original) (internal citations omitted).

296. *Id.* at 240.

297. *Id.* at 241.

298. *Id.*

299. *Id.* at 241-44.

300. *Id.* at 241-42.

301. *Id.* at 242.

302. *Id.*

303. *Id.* at 243.

304. *Id.*

305. *Id.*

Finally, the court found that St. David's unilateral right to dissolve the partnership was illusory, as it only applied in the event of a change of law, and to dissolve the partnership would likely destroy St. David's business; the parties had executed a non-competition covenant triggered by dissolution.<sup>306</sup>

The circuit court thus vacated the lower court's ruling and remanded the case back to the district court for further proceedings.<sup>307</sup> Although the circuit court ruled in favor of the government, the case is still pending before a trial judge in the district court. In vacating the district court's summary judgment ruling, the circuit court determined only that the case can move forward through trial. St. David's will thus have the opportunity to demonstrate, if it can, that it did not cede control to HCA, and that no more than an "insubstantial" amount of the partnership's activities further non-charitable interests.<sup>308</sup> Exempt organizations and their counsel will be closely following the outcome of *St. David's II*.

## VI. EMTALA: INTERIM GUIDANCE

On September 9, 2003, CMS published its final rule regarding the Emergency Medical Treatment and Active Labor Act ("EMTALA"),<sup>309</sup> which became effective November 10, 2003, clarifying the responsibilities of Medicare participating hospitals and Critical Access Hospitals ("CAH") in treating individuals who present to the hospital requesting examination or treatment.<sup>310</sup> The final rule provided needed clarification of many provisions of EMTALA. CMS expanded the definition of "hospital emergency department" and the meaning of the phrase "come to the emergency department."<sup>311</sup> The EMTALA requirements apply if an individual presents (1) at the hospital's dedicated emergency department and requests examination or treatment for a medical condition, or (2) elsewhere on the hospital's property that is not part of the

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306. *Id.* at 244. The court noted that if St. David's dissolved the partnership, it would be forbidden from competing in the Austin, Texas community and would effectively cause St. David's to cease to exist. *Id.* Moreover, without HCA as its partner, St. David's would not likely survive financially. *Id.* at 239.

The present case illustrates why, when a non-profit organization forms a partnership with a for-profit entity, courts should be concerned about the relinquishment of control. St. David's by its own account, entered into the partnership with HCA out of financial *necessity* (to obtain the revenues needed for it to stay afloat). HCA, by contrast, entered the partnership for reasons of financial *convenience* (to enter a new market). The starkly different financial positions of these two parties at the beginning of their partnership negotiations undoubtedly affected their relative bargaining strength.

*Id.*

307. *Id.* at 244.

308. *Id.* at 237.

309. 42 U.S.C. § 1395 (2003).

310. Medicare Program; Clarifying Policies Related to the Responsibilities of Medicare-Participating Hospitals in Treating Individuals with Emergency Medical Conditions, 68 Fed. Reg. 53,222 ("EMTALA Final Rule").

311. *Id.* at 53,227 - 53,234 (to be codified at 42 U.S.C. § 489.24(b)).



dedicated emergency department and requests examination or treatment for what may be a medical condition.<sup>312</sup> In either case, a hospital is required to provide an appropriate medical screening examination.<sup>313</sup> If the individual has an emergency medical condition, the hospital must provide the necessary stabilizing treatment within the hospital's capacity or capabilities and if necessary, arrange for an appropriate transfer to another hospital.<sup>314</sup>

EMTALA applies not only to dedicated emergency departments but also to other areas of the hospital's main campus or property when an individual presents requesting medical treatment.<sup>315</sup> If an individual is in a location of the hospital other than the dedicated emergency department and, based on a "prudent layperson's" belief, that individual clearly needs medical attention or services (e.g., visitor collapses in the hospital's cafeteria or appears to be suffering chest pains in the waiting room), the hospital should have policies and procedures to assure that the individual receives an appropriate medical screening examination and EMTALA requirements are followed.<sup>316</sup>

A "dedicated emergency department" is defined in the final rule as any hospital department or facility, regardless whether it is located on or off the main hospital campus, meeting at least one of the following requirements:

a facility licensed by the State as an emergency department (applicable only in a few states);

a hospital department or clinic that is held out to the public as a place that provides care for emergency medical conditions on an urgent basis without requiring a previously scheduled appointment; or

a hospital department or facility that provides at least one-third of its entire outpatient visits for the treatment of emergency medical conditions on an urgent basis without requiring a previously scheduled appointment.<sup>317</sup>

A hospital's dedicated emergency department would not only encompass what is generally thought of as a hospital's "emergency room," but also include other departments of a hospital (e.g., labor and delivery departments and psychiatric units of hospitals), that provide emergency or labor and delivery services, or both, to individuals who may present as unscheduled ambulatory patients but are routinely admitted to be evaluated and treated.<sup>318</sup>

The third criteria, a facility that accepts patients without requiring appointments, may encompass urgent care centers owned by a hospital and

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312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at 53,238 - 53,243 (to be codified at 42 U.S.C. § 489.24(b)).

316. *Id.* at 53,240 - 53,242 (to be codified at 42 U.S.C. § 489.24(b)).

317. *Id.* at 53,227 - 53,234 (to be codified at 42 U.S.C. § 489.24(b)).

318. *Id.*

reimbursed under the hospital's Medicare provider number.<sup>319</sup>

Hospital property includes "the entire main hospital campus including the parking lot, sidewalk, and driveway," but for purposes of EMTALA does not include "other areas or structures of the hospital's main building that are not part of the hospital, such as physician offices, or other entities that participate separately in Medicare, or restaurants, shops, or other non-medical facilities."<sup>320</sup>

Urgent Care Centers, owned and billed under a hospital's provider number, are not categorically exempt from EMTALA regulations.<sup>321</sup> It would be difficult for any individual in need of emergency care to distinguish between a hospital department that provides care for an "urgent need" and one that provides care for an "emergency medical condition."<sup>322</sup> Thus, if the department or facility is held out to the public as a place that provides care for emergency medical conditions, it would meet the definition of a dedicated emergency department.<sup>323</sup> If an urgent care center participates in Medicare through a hospital and operates as a satellite facility off the main hospital campus, the urgent care center may transfer a patient in an unstable condition to an affiliated hospital, if the urgent care center first screens the individual and determines treatment of the individual's condition is not within the capability or capacity of the center.<sup>324</sup> That is, if a patient presents to an urgent care center owned by Hospital "X," the center must first screen the patient. If the center's screen indicates that the patient has an emergency medical condition for which the center is not equipped, the center may transfer the patient to Hospital "X." In addition, an urgent care center may transfer a patient in an unstable condition to a non-affiliated hospital if, in addition to screening the patient, the benefits of transfer exceed the risks.<sup>325</sup>

## VII. QUALITY ASSESSMENT, ASSURANCE AND IMPROVEMENT

Several changes have developed in the role of quality assessment and improvement in health care in 2003. The Department of Health and Human Services promulgated a regulation mandating quality and performance initiatives from all Medicare-participating hospitals and skilled nursing facilities;<sup>326</sup> the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO") modified its survey process to include a hospital self-assessment with quality-specific goals;<sup>327</sup> and managed care payors continued to increase their use of quality measurements as a component of total fees paid for health care

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319. *Id.*

320. *Id.*

321. *Id.* at 53,231.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. Medicare and Medicaid Programs; Hospital Conditions of Participation: Quality Assessment and Performance Improvement, 68 Fed. Reg. 3435 (Jan. 24, 2003) (codified at 42 C.F.R. Part 482.21 (2004)).

327. *Shared Visions—New Pathways*, 22 PERSPECTIVES 1, Oct. 2002 (JCAHO newsletter).



services.<sup>328</sup> In addition, CMS partnered with Premier, an alliance of 1500 hospitals, to undertake a three-year demonstration project in which the Medicare program will pay a premium for quality by rewarding top performing hospitals with additional funds.<sup>329</sup>

In addition, quality assurance is receiving a great deal of attention from our nation's lawmakers. Congress took up the issue with the House of Representatives, introducing bills such as the Patient Safety and Quality Improvement Act<sup>330</sup> and the Patient Safety Improvement Act of 2003,<sup>331</sup> and the Senate introducing its own Patient Safety and Quality Improvement Act of 2003,<sup>332</sup> all designed to address voluntary reporting of medical errors, the development of patient safety organizations, and the creation of a privilege applicable to information reported under such a system.<sup>333</sup>

#### *A. Medicare Condition of Participation*

Since 1986, Medicare regulations have required hospitals, as a condition of participation in the Medicare program, to maintain a system to evaluate the provision of patient care, to assess deficiencies in the delivery of medical care,

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328. See, e.g., *Profiles of Organizations Using Quality Incentive*, NATIONAL HEALTH CARE PURCHASING INSTITUTE, at <http://www.nhcpi.net/pdf/profiles.pdf> (finding that 14 of 14 profiled health insurers, purchasers, and employer coalitions use quality-based incentive programs in managed care contracting). In addition, Anthem Inc., one of Indiana's larger private health care insurers, uses a Hospital Quality Improvement Program to develop a Hospital Quality Scorecard for each hospital, which data is used in the computations establishing hospital reimbursement rates. Anthem regularly makes information regarding such programs available on its Internet website, [www.anthem80.com](http://www.anthem80.com).

329. See *HHS to Launch Medicare Demonstration to Promote High Quality Care in Hospitals*, HHS News Release, July 10, 2003; C. Becker, *Time to Pay for Quality*, MODERN HEALTHCARE 6 (June 30, 2003).

330. H.R. 663, 108th Cong. (2003). The Patient Safety and Quality Improvement Act was proposed to amend Title IX of the Public Health Service Act to provide for the improvement of patient safety and to reduce the incidence of events that adversely affect patient safety. H.R. 663 would also impose specific clinical improvement initiatives based on data collected under the initiatives the bill would create. As a safeguard, the bill would also provide for limited privilege and confidentiality provisions regarding reported data. See *id.* § 3(a) (recommended additions to "Part C" of Title IX).

331. H.R. 877, 108th Cong. (2003). The Patient Safety Improvement Act of 2003 would implement a medical information technology reporting mechanism for medical errors, along with a technology advisory board and voluntary standards intended to induce information technology interoperability in the healthcare marketplace.

332. S. 720, 108th Cong. (2003). The Patient Safety and Quality Improvement Act of 2003 (bearing the same short name as H.R. 663) would implement medical error reporting similar to that of H.R. 663, but would provide more comprehensive privilege and confidentiality provisions. See *id.* § 3.

333. H.R. 663, H.R. 877, and S. 720 all resurrect legislation that did not survive the 107th Congress. See H.R. 5478, 107th Cong. (2002); H.R. 4889, 107th Cong. (2002).

and to take remedial action where necessary.<sup>334</sup> In 1999, a report published by the Institute of Medicine ("IOM") announced that "at least 44,000 Americans die each year as a result of [preventable] medical errors [and] the number may be as high as 98,000."<sup>335</sup> The IOM report ultimately encouraged the Department of Health and Human Services and its Centers for Medicare and Medicaid Services ("CMS") to promulgate a regulation intended to modify its Medicare conditions of participation to more closely reflect the current state of quality improvement practices.<sup>336</sup> The updated rule expands the existing regulations and requires each Medicare-certified hospital to adopt a Quality Assessment and Performance Improvement ("QAPI") program as a condition of participation in the Medicare program.<sup>337</sup>

Many privately accredited hospitals already have a quality assurance policy in place, though no such approach has previously been mandated for state-certified Medicare-participating hospitals. Hospitals that obtain JCAHO accreditation will be deemed to be in compliance with the conditions of participation including the QAPI,<sup>338</sup> and organizations reviewed by Quality Improvement Organizations ("QIOs") are deemed to have satisfied the utilization review and evaluation conditions of participation.<sup>339</sup> Hospitals that are not accredited by QIOs rely instead on state agencies to assess compliance with the certification requirements of the Medicare program.<sup>340</sup> A state agency or QIO will determine whether the hospital is in compliance with the QAPI condition of participation, which is directed at ensuring uniformity in quality standards for all Medicare-participating hospitals.<sup>341</sup> This rule requires, at a minimum, that each hospital must systematically examine its quality performance and implement specific improvement projects on an ongoing basis.<sup>342</sup> More importantly, QAPI is intended to identify preventable errors, and to enable hospitals to develop means to prevent them.

The condition of participation requires every Medicare certified hospital to develop, implement, maintain, and evaluate its own QAPI program, which must be hospital-wide, ongoing, and focused on indicators related to the improvement of health outcomes.<sup>343</sup> Each hospital will be required to maintain and

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334. 42 C.F.R. § 482.21 (2002).

335. Linda T. Kohn et al., *To Err Is Human: Building a Safer Health System*, COMMITTEE ON QUALITY OF HEALTH CARE IN AMERICA, INSTITUTE OF MEDICINE, at 1 (National Academy Press, 1999).

336. Medicare and Medicaid Programs; Hospital Conditions of Participation: Quality Assessment and Performance Improvement, 68 Fed. Reg. 3435 (Jan. 24, 2003) (codified at 42 C.F.R. pt. 482).

337. *Id.*; see also 42 C.F.R. § 482.21 (2001), as amended.

338. 42 C.F.R. § 488.5(a).

339. *Id.* § 488.14.

340. *Id.* § 488.11.

341. Medicare Program, 68 Fed. Reg. at 3442-43.

342. *Id.* at 3435.

343. 42 C.F.R. § 482.21 (2002).



demonstrate evidence of its QAPI program and related efforts for review by CMS.<sup>344</sup> The regulations set forth five standards related to the development of a hospital's QAPI program.

*Standard one, Program Scope*, provides that the hospital must demonstrate that its QAPI program examines and initiates measurable improvements, on an ongoing basis, in indicators that, based on objective evidence, will improve health outcomes and identify and reduce medical errors.<sup>345</sup> In addition, standard one requires the hospital to measure, analyze, and track quality indicators, such as "adverse patient events, and other aspects of performance that assess processes of care, hospital service, and operations."<sup>346</sup> CMS has declined to publish areas on which hospitals should focus their QAPI efforts because a closed list stifles innovation, does not allow hospitals to directly address their peculiar strengths and weaknesses, and would be subject to constant modification as the state of the art progresses and as the standards of care evolve.<sup>347</sup> Consequently, CMS drafted the QAPI regulations to make the program scalable for hospitals of differing size and financial means and to allow for individual hospital flexibility, following a prescribed selection and evaluation process. First, the hospital must identify the hospital's critical patient care and services components.<sup>348</sup> Next, the hospital must apply performance measures that are predictive of quality outcomes that would result from delivery of the patient care and services.<sup>349</sup> Finally, the hospital must use a continuous method of data collection and evaluation that identifies or triggers further opportunities for improvement.<sup>350</sup>

*Standard two, Program Data*, provides a framework and defines expectations for hospitals regarding the quality indicator data necessary for a QAPI program.<sup>351</sup> In particular, this standard refers to information submitted to, or received from, the hospital's QIO (if it has one).<sup>352</sup> Hospitals that do not use QIOs may satisfy the conditions of participation by identifying measures of performance for the activities each such hospital identifies as a priority.<sup>353</sup> The hospital must use the data to monitor the effectiveness and safety of services and quality of care, and to identify opportunities for improvement and changes that will lead to improvement and error prevention.<sup>354</sup>

*Standard three, Program Activities*, defines the conduct to take place in the QAPI program, and clarifies that the hospital's responsibility under its QAPI

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344. Medicare Program, 68 Fed. Reg. at 3442-43.

345. 42 C.F.R. § 482.21(a).

346. *Id.* § 482.21(a)(2).

347. Medicare Program, 68 Fed. Reg. at 3437; *but see id.* at 3435 (describing throughout the preamble numerous sources for topics suitable for hospital quality improvement attention).

348. *Id.* at 3439.

349. *Id.*

350. *Id.*

351. 42 C.F.R. § 482.21(b) (2002).

352. *Id.*

353. *Id.*

354. *Id.*

program is to focus resources on improvement, considering prevalence and severity of incidence, or both, of high-risk, high-volume or problem prone areas, and giving priority to improvement activities that affect health outcomes, patient safety, and quality of care.<sup>355</sup> A hospital's QAPI activities should track adverse patient events, analyze their causes, and implement preventive actions and mechanisms of feedback and learning throughout the hospital.<sup>356</sup> This must include incidents of medical errors and adverse patient events.<sup>357</sup> Each hospital is also required to take action designed to improve performance, and to measure its success and track its performance to assure that improvements are sustained.<sup>358</sup>

*Standard four, Performance Improvement Projects*, requires that each hospital must conduct performance improvement projects as part of its QAPI program.<sup>359</sup> The number of performance improvement projects a hospital undertakes must be "proportional to the scope and complexity of the hospital's services and operations."<sup>360</sup> The regulations expressly permit a hospital to develop and implement an information technology system as one of its performance improvement projects.<sup>361</sup> Hospitals must document each performance improvement project undertaken, the reasons for conducting the project, and the measurable progress achieved on the project.<sup>362</sup>

QIO cooperative projects will satisfy this standard's requirement for performance improvement projects.<sup>363</sup> Projects undertaken pursuant to this standard must involve a degree of effort comparable to that of a QIO project.<sup>364</sup> Hospitals must ensure that the clinical topics selected for performance improvement projects, and the priorities assigned to such clinical topics, evaluate the following criteria: (1) prevalence, incidence and disease impact relative to the affected population; (2) scientific consensus regarding improvement of patient outcomes; (3) measurability of processes or outcomes; and (4) the opportunity to improve care.<sup>365</sup>

*Standard five, Executive Responsibilities*, holds the hospital's leadership responsible and accountable for QAPI activities.<sup>366</sup> The hospital's governing body, medical staff, and administrative officials are responsible and accountable

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355. *Id.* § 482.21(c).

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.* § 482.21(d).

360. *Id.* § 482.21(d)(1).

361. *Id.*

362. *Id.*

363. Medicare and Medicaid Programs; Hospital Conditions of Participation: Quality Assessment and Performance Improvement, 68 Fed. Reg. 3435, 3439-41 (Jan. 24, 2003) (codified at 42 C.F.R. pt. 482).

364. *Id.*

365. *Id.* at 3442.

366. 42 C.F.R. § 482.21(e).



for ensuring that the hospital defines, implements and maintains an ongoing program for quality improvement and patient safety, including the reduction of medical errors. Further, these individuals must ensure that the hospital-wide quality assessment and performance improvement efforts address priorities for improved quality of care and patient safety, that clear expectations for safety are established, and that all improvement actions are evaluated. In addition, they must ensure that adequate resources are allocated for measuring, assessing, improving, and sustaining the hospital's performance and reducing risk to patients. Finally, these individuals must determine the number of distinct improvement projects to be conducted annually.<sup>367</sup>

The QAPI regulation identifies the minimum efforts necessary to satisfy the conditions of participation. The risk is therefore clear: a hospital that exerts less than the minimum effort may lose its Medicare certification. CMS intends information technology to ultimately be shared on a nationwide basis (within the constraints of HIPAA and analogous State laws) to construct a dynamic best practices approach to delivery of medical care.<sup>368</sup> Benchmarking will be a large part of the process and will undergo periodic restatement to reflect development of the state of the art and evolution of the standard of care applicable to the clinical process under study.<sup>369</sup> The heightened use of information technology, in the view of CMS, will revolutionize the delivery of medical care, and will prevent the preventable error.<sup>370</sup>

### *B. JCAHO Periodic Performance Review*

The Joint Commission on Accreditation of Health Care Organizations ("JCAHO") has announced its Shared Visions-New Pathways initiative.<sup>371</sup> This new initiative adds an intermediate accreditation review, the periodic performance review ("PPR"), at the 18-month midpoint between triennial onsite surveys.<sup>372</sup> Under this initiative, each hospital will self-evaluate its compliance with all applicable accreditation standards, and based on the PPR will prepare a plan of action ("POA") designed to address any findings in the PPR.<sup>373</sup>

Hospitals have three options for the intermediate review under the new JCAHO initiative. Option one is to conduct a full PPR, prepare a POA, and submit to JCAHO the PPR results, POA and subsequent measures of success ("MOS") related to any non-compliance. Option two is to conduct a full PPR, prepare a POA and MOS, but attest that, based on advice of counsel, the hospital will not submit PPR results or POA to JCAHO (although any MOS are made available at time of next triennial survey). Option three allows a hospital to

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367. *Id.*

368. Medicare Program, 68 Fed. Reg. at 3440.

369. *Id.* at 3444.

370. *Id.* at 3440.

371. 22 PERSPECTIVES 1, Oct. 2003 (JCAHO newsletter).

372. *Id.*; see generally <http://www.jcaho.org/accredited=organizations/SVNP/> (providing links to numerous JCAHO resources).

373. 22 PERSPECTIVES 1, Oct. 2003 (JCAHO newsletter).

conduct a PPR and attest that, based on advice of counsel, the hospital will instead undergo an independent JCAHO compliance assessment survey and POA development, and will report its POA to JCAHO and make any MOS available at time of next triennial survey.<sup>374</sup>

Hospitals must comply with this initiative to maintain JCAHO accreditation.<sup>375</sup> The approach to compliance will differ from hospital to hospital based on several considerations, including the hospital's ability to protect the information adduced during a self-evaluation. In Indiana, self-critical analysis is not subject to the peer review privilege if it is not related to the provision of patient care,<sup>376</sup> so any findings that constitute admissions could create risk from litigation in the future. Thus, hospitals must assess the risks and benefits associated with the PPR. Clearly, there are advantages to conducting a full PPR (e.g., the hospital will be continuously accredited throughout the period between triennial onsite reviews), but it also creates risks relating to disclosure of self-critical analysis. While options two and three do not provide that same accreditation guarantee, they do preserve the dissemination of self-critical analysis a hospital prepares. Unless a hospital can take sufficient prophylactic measures, the self-disclosure of self-critical analysis may lead to substantial risks that outweigh the benefits from the PPR process.

#### VIII. *IN RE MANAGED CARE*<sup>377</sup>

Approximately 700,000 physicians are represented in a national class action lawsuit, *In re Managed Care Litigation*, initiated in March of 2001 against thirteen entities representing the nation's largest insurers, including Aetna, Inc., Aetna-USHC, Inc., and Cigna.<sup>378</sup> The American Medical Association in conjunction with several state and local medical societies and individual representatives of the physician population alleged that the insurers violated the Racketeer Influenced and Corrupt Organizations Act<sup>379</sup> and state prompt-pay laws<sup>380</sup> in processing claims since 1990. Aetna and Cigna have settled the claims, but the remaining insurers are still defending the case.

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374. *Id.*

375. *Id.*

376. Privileged Communications of Health Care Provider Peer Review Committees, IND. CODE § 34-30-15-1 to -23 (1999).

377. *In re Managed Care Litigation*, MDL No. 1334, 00-1334-MD-MORENO (S.D. Fla. 2003).

378. The following are all named defendants in the suit: Humana, Inc.; Aetna, Inc.; Aetna-USHC, Inc.; Cigna; Coventry Health Care, Inc.; Health Net, Inc.; Humana Health Plan, Inc.; PacifiCare Health Systems, Inc.; Prudential Insurance Company of America; United Health Group; United Health Care; Wellpoint Health Networks; and Anthem, Inc. *Id.* at \*1.

379. 18 U.S.C. §§ 1961-68 (2002).

380. See, e.g., IND. CODE §§ 27-13-36.2-1 to -7 (2003) (providing for prompt payment of claims for services furnished to patients of health maintenance organizations); *id.* § 27-8-5.7-5 (providing for prompt payment of claims for services furnished to patients of preferred provider organizations).



Aetna settled the *In re Managed Care* class' claims by means of a settlement agreement providing for, among other things, payment to individual physicians.<sup>381</sup> In the settlement agreement, Aetna agreed to modify a number of its business practices. In particular, the insurer has agreed to modify its utilization review processes, define parameters for timely claims payment, establish dispute resolution procedures, and undertake various other business practice initiatives.<sup>382</sup> In addition, Aetna paid approximately \$100 million into a settlement fund to be distributed to class members who elected to participate in the settlement (approximately \$142.56 per physician).<sup>383</sup> As part of the settlement, Aetna also created a charitable foundation "dedicated to promoting high quality health care [through] initiatives that assist physicians to improve [or] enhance the quality of care received by patients."<sup>384</sup>

Cigna HealthCare also executed a settlement agreement that resolved the claims against it in the *In re Managed Care Litigation* class action.<sup>385</sup> Among other things, Cigna will pay \$30 million into a settlement fund for individual physician class members to be paid based on each physician's experience with specified billing codes,<sup>386</sup> and \$15 million into a foundation "dedicated to promoting high quality health care [with] particular emphasis [on] initiatives that assist Physicians to improve/enhance the quality of care received by patients and to enhance the delivery of care to the disadvantaged members of the public."<sup>387</sup> Cigna will also pay \$55 million for the plaintiff class' attorneys' fees, costs and expenses.<sup>388</sup>

#### IX. MANAGED CARE: USUAL AND CUSTOMARY CHARGES— OIG REGULATIONS

The OIG has permissive exclusion authority—the authority to exclude a health care provider or individual from the Medicare program—over any individual or entity that it finds to have

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381. The settlement agreement was preliminarily approved on May 30, 2003, a Final Approval Order and Judgment was entered on October 24, 2003, and a Supplemental Final Approval Order was entered on November 6, 2003. *In re Managed Care Litigation*, MDL No. 1334, 00-1334-MD-MORENO (S.D. Fla. 2003). To be eligible for settlement payments, individual physicians were required to submit a "Proof of Claim" no later than September 30, 2003. *Aetna Settlement Agreement* § 8.5. Documents and additional information related to the Aetna settlement are available on the Internet at <http://www.managed-care-litigation.com/>.

382. *Aetna Settlement Agreement* § 7.

383. *Id.* § 8.2.

384. *Id.* § 8.1.

385. The settlement agreement was preliminarily approved on September 4, 2003, and a Final Approval Hearing was held on December 18, 2003. *In re Managed Care Litigation*, MDL No. 1334, (S.D. Fla. 2003). A Final Approval Order was entered on February 2, 2004.

386. *Cigna Settlement Agreement* § 2.

387. *Cigna Settlement Agreement*, Exhibit 9, at 3.

388. *Id.* § 14.

submitted or caused to be submitted bills or requests for payment (where such bills or requests are based on charges or cost) under [Medicare or Medicaid] containing charges . . . for items or services furnished *substantially in excess* of such individual's or entity's *usual charges* . . . for such items or services, unless the Secretary finds there is *good cause* . . . .<sup>389</sup>

Since 1987, when Congress codified this power, the OIG has done very little to use it to exclude any person from the Medicare program,<sup>390</sup> largely due to the vague nature of the statute's core terms, "substantially in excess," "usual charges," and "good cause." For the third time, the OIG has published a proposed rule that would, among other things, define these three key terms.<sup>391</sup> Historically, "usual charges" was reflected in a hospital's charge master<sup>392</sup> as the full billed charge for services. In the proposed rule, the OIG would define the term "usual charges" to mean amounts billed to self-pay patients and patients covered by indemnity insurers with which the provider has no contractual arrangement, and any fee-for-service rates it contractually agrees to accept from any payor including any discounted fee-for-service managed care rates.<sup>393</sup> The OIG's rationale for this change is that, because managed care negotiated rates may constitute a large percentage of a hospital's overall revenue, "usual charges" (as that term is used in the OIG's statutory permissive exclusion authority) must reflect the discounts that a hospital provides to its managed care organizations.<sup>394</sup>

OIG would not consider certain specified charges to be "usual," including charges for services furnished to uninsured patients free of charge or at a substantially reduced rate, capitated payments, certain hybrid fee-for-service

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389. 42 U.S.C. § 1320a-7(b)(6)(A) (2002) (emphasis added) (authorizing the Secretary of the Department of Health and Human Services to enforce the permissive exclusion power); 53 Fed. Reg. 12993 (Apr. 20, 1988) (delegating such authority to the OIG).

390. Virtually no case law references the exclusionary authority relating to excessive charges, although the petitioner in *Green v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990), sought, unsuccessfully, to have a mandatory exclusion recast as a permissive exclusion under § 1320a-7(b). In a case heard in Indiana, a plaintiff sought to have a contract declared invalid because it violated § 1320a-7(b)(6). *Zimmer v. NuTech Med., Inc.*, 54 F. Supp. 2d 850, 853 (N.D. Ind. 1999). The court determined invalidity on other grounds. *Id.* at 863-64.

391. Medicare and Federal Health Care Programs: Fraud and Abuse; Clarification of Terms and Application of Program Exclusion Authority for Submitting Claims Containing Excessive Charges, 68 Fed. Reg. 53,939 (Sept. 15, 2003) (to be codified at 42 C.F.R. pt. 1001). The OIG published, but never finalized, proposed rules addressing the definitions of the key terms of its exclusion authority in 1990 and 1993. 55 Fed. Reg. 12205 (Apr. 2, 1990); 62 Fed. Reg. 46,676 (Sept. 8, 1997).

392. A hospital's charge master reflects the price charged for each of the thousands of individually-coded services the hospital offers.

393. Medicare Program, 68 Fed. Reg. at 53,944 (to be codified at 42 C.F.R. § 1001.701 (a)).

394. *Id.* at 53,941.



arrangements, and fees set by Medicare or Medicaid.<sup>395</sup> In determining “usual charge,” the OIG has proposed two different methodologies: computing the average of a provider’s charge for each particular item or service, or computing the median charge for such item or service.<sup>396</sup> Notably, claims for physician services under Medicare Part B are excluded from the proposed rule because “the fee schedule amounts for physician services . . . are functionally equivalent to a prospective payment methodology.”<sup>397</sup>

Whether a provider submits a claim for payment that is “substantially in excess” of its usual charge will be a mathematic calculation under the OIG’s proposed rule.<sup>398</sup> If a claim for service seeks payment that is more than 20% in excess of the provider’s “usual charge,” the OIG’s proposed rule would deem that charge to be “substantially in excess” of the usual charge.<sup>399</sup> OIG has given no concrete basis for the seemingly arbitrary 20% threshold, and has offered only the explanation that “anecdotal evidence” supports that figure.<sup>400</sup>

In the event that a provider charges Medicare an amount that is “substantially in excess” of its “usual charge” but has “good cause,” the provider will not be subject to the OIG’s permissive exclusion authority.<sup>401</sup> OIG has indicated that “good cause” exists where a provider sets forth a “reasonable set of underlying facts and circumstances” necessitating the higher charge, such as unusual circumstances or medical complications experienced by the provider.<sup>402</sup>

As a general rule, the OIG’s proposal would equate payments with charges, but should not significantly affect payments received under the Medicare program. The determination whether a provider is charging Medicare substantially in excess of its usual charges only applies where Medicare pays the lower of cost or charges or the appropriate fee schedule.<sup>403</sup> Because, as a general rule, providers’ charges are higher than the Medicare fee schedule, the proposed rule should typically not come into play. Nonetheless, if the proposed rule is finalized in its present form, providers will need to determine, on an ongoing basis, whether their charges exceed the 20% threshold, on a service by service basis, to prevent inadvertently “overcharging” the Medicare program. Moreover, because providers update their charge masters, managed care organizations continually negotiate new agreements with providers, and the Medicare program continually modifies its fee schedules, the exercise proposed by the OIG will become time consuming and potentially quite expensive.

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395. *Id.*

396. *Id.*

397. *Id.* at 53,940.

398. *Id.* at 53,941.

399. *Id.* at 53,942.

400. *Id.*

401. *Id.* at 53,942-43.

402. *Id.*

403. 42 U.S.C. § 1320a-7(b)(6)(A) (2002).

## X. IMMIGRATION: VISASCREEN CERTIFICATION FOR HEALTH CARE WORKERS

Shortages in health care professionals, most notably nurses, have caused U.S. employers to look outside the country's borders to fill the gap.<sup>404</sup> Consequently, the immigration laws are an increasingly important consideration in health care staffing and human resource management. The recent modification of the VisaScreen requirement<sup>405</sup> is a noteworthy development in immigration law applicable to the health care industry.

On July 25, 2003, the Department of Homeland Security ("DHS") published its final rule related to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")<sup>406</sup> and the Immigration and Nationality Act ("INA").<sup>407</sup> The IIRIRA requires that certain foreign healthcare workers have their credentials evaluated and certified before they will be allowed to work in their professions in the United States.<sup>408</sup> Although IIRIRA has always required a credentials evaluation for foreign healthcare workers seeking permanent residency, under the new final rule it is also required of those seeking non-immigrant status in the United States.<sup>409</sup> The rule lists seven categories of health care workers to which the VisaScreen applies: nurses, physical therapists, occupational therapists, speech-language pathologists and audiologists, medical technologists (also known as clinical laboratory scientists), medical technicians (also known as clinical laboratory technicians), and physicians' assistants.<sup>410</sup>

The IIRIRA provides that the Commission on Graduates of Foreign Nursing Schools ("CGFNS"), through its International Commission on Healthcare Professionals ("ICHP") division, administers the VisaScreen verification.<sup>411</sup> The statute does not specifically list all of the healthcare professions affected by the VisaScreen requirement (although physicians are specifically exempted), so employers and employees in unlisted healthcare professions are unclear as to the status of some professionals.<sup>412</sup> A recent guidance memo issued by the Citizenship and Immigration Service does state that currently only those professionals described by the final rule's seven categories are subject to the VisaScreen requirements.<sup>413</sup>

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404. J. Berger, *From Philippines, with Scrubs: How One Ethnic Group Came to Dominate the Nursing Field*, N.Y. TIMES, Nov. 24, 2003, at B1.

405. Certificates for Certain Health Care Workers, 68 Fed. Reg. 43,901 (July 25, 2003) (the "VisaScreen").

406. Pub. L. No. 104-208, 110 Stat. 3009, 636-37 (1996) (codified at 8 U.S.C. § 1182(a)(5)(x) (2002)).

407. 8 U.S.C. §§ 1101-1537 (2003).

408. IIRIRA § 343.

409. 42 C.F.R. § 212.15 (2002).

410. *Id.* § 212.15(c).

411. 8 U.S.C. § 1182(a)(5)(C) (2002).

412. *See id.*

413. Memorandum from William Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security (Sept. 22, 2003), *available at*



When originally introduced, the VisaScreen provisions of the IIRIRA established a new ground of inadmissibility for applicants seeking entry to the United States to work in health care.<sup>414</sup> The law dictates that an applicant is inadmissible unless he or she presents a certificate verifying that his or her education, training, license, and experience meet all requirements for entry to the United States and that the applicant is competent in both spoken and written English.<sup>415</sup>

#### XI. LABOR: DEVELOPMENTS IN THE INDIANA WAGE PAYMENT STATUTE<sup>416</sup>

In *Highhouse v. Midwest Orthopedic Institute*,<sup>417</sup> the Indiana Court of Appeals ruled on a case concerning the Indiana Wage Payment Statute. This case was granted transfer by the Indiana Supreme Court and a ruling is expected some time in 2004. A review of the issues and the appellate court's decision is appropriate.

Dr. Michael Highhouse had entered into an employment agreement with Midwest Orthopedic Institute ("MOI") in 1996.<sup>418</sup> Roughly three years into the contract, Dr. Highhouse gave MOI ninety days notice that he was terminating the employment agreement and would resign from MOI effective June 30, 1999, the end of the contract term.<sup>419</sup> Thereafter a dispute arose as to what monies were owed to the physician after his resignation.

Two specific issues required the trial court's interpretation. The first was whether the physician was owed any post-termination bonus payments under the employment agreement. The employment agreement provided that Dr. Highhouse would receive an annual bonus based upon his "productivity, collection of accounts, office expenses . . . and the net income of [various] offices [in] Indiana."<sup>420</sup> Although Dr. Highhouse received his quarterly bonus for May 1999, he did not receive any further bonus payments following his resignation, while MOI continued to collect payments for services furnished by Dr. Highhouse prior to his resignation.<sup>421</sup>

On appeal, MOI argued that the plain language of the employment agreement prohibited Dr. Highhouse from receiving bonuses after resigning. In support of its position, MOI cited the termination without cause section of the employment agreement that said Dr. Highhouse would only receive his regular compensation if MOI terminated the agreement early and gave ninety-day notice. However, the court found that this provision did not apply where Dr. Highhouse terminated the

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<http://uscis.gov/graphics/lawsregs/handbook/FHCWmemo092203.pdf>.

414. Pub. L. No. 104-208, § 343, 110 Stat. 3009 (1996).

415. 8 U.S.C. § 1182(a)(5)(C).

416. IND. CODE §§ 22-2-5-1 to -3 (2003).

417. 782 N.E.2d 1006 (Ind. Ct. App. 2003).

418. *Id.* at 1009.

419. *Id.* at 1008.

420. *Id.* at 1009.

421. *Id.*

agreement, and noted that the agreement was silent on that point.<sup>422</sup> The court agreed with Dr. Highhouse that his right to bonus payments vested at the time he performed the services related thereto.<sup>423</sup> Therefore, the court ruled that Dr. Highhouse was due bonus payments he earned prior to his resignation.<sup>424</sup>

The second issue was whether these monies owed to Dr. Highhouse were truly "bonuses," as referred to in the employment agreement, or "wages" as defined in the Indiana Wage Payment Statute.<sup>425</sup> If the monies were "wages," then the physician would also be entitled to a mandatory award of liquidated damages pursuant to the Indiana Wage Payment Statute.<sup>426</sup> Specifically, the statute requires an employer to pay wages to an employee who voluntarily leaves employment on the "next usual and regular day for payment of wages" following his or her departure.<sup>427</sup> The Indiana Wage Payment Act defines wages as "all amounts at which the labor or service rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or in any other method of calculating such amount."<sup>428</sup>

In past cases, Indiana courts found that a payment will constitute a wage despite being called a bonus if it relates directly to the time an employee works; is paid on a regular, periodic basis, and was not predicated on the financial success of the employer.<sup>429</sup> In finding that the bonus payments were actually "wages," the court cited the mandatory language in the employment agreement: "Employer shall also pay an annual bonus to Employee based upon Employee's productivity . . . ."<sup>430</sup> In addition, the court noted that MOI historically paid bonuses on a quarterly basis (*i.e.* paid on a regular, periodic basis).

The appellate court therefore found that the trial court erred by not granting Dr. Highhouse partial summary judgment on his claim that the bonuses constituted wages under the Indiana Wage Payment Statute.<sup>431</sup> However, as noted above, the Indiana Supreme Court's ruling is expected in 2004 and is anticipated to provide additional guidance as to the definition of "wages" in Indiana.

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422. *Id.* at 1011.

423. *Id.*

424. *Id.* at 1011, 1012.

425. *Id.* at 1012.

426. *Id.*

427. IND. CODE § 22-2-5-1 (1998).

428. *Id.* § 22-2-9-1(b).

429. *Highhouse*, 782 N.E.2d at 1013 (citing *Gurnik v. Lee*, 587 N.E.2d 706, 710 (Ind. Ct. App. 1992)).

430. *Id.* at 1014.

431. *Id.*



# SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

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## INTRODUCTION

During this survey period,<sup>1</sup> the courts decided significantly more automobile insurance than commercial liability cases. Many of the automobile decisions addressed the scope of coverage for a driver's alleged permissive use of an automobile and clarified the extent of coverage that may be available. However, one decision on declaratory judgment stands to significantly impact the insurance coverage field and deserves special attention. This Article addresses the past year's cases, and analyzes their effect on the practice of insurance law.<sup>2</sup>

## I. DECLARATORY JUDGMENT INSURANCE CASES

### *A. Third Party Claimant May Pursue Declaratory Judgment Action*

As most insurance practitioners know, a declaratory judgment action is the usual means to determine the scope of insurance coverage owed when a dispute exists. In most coverage lawsuits involving third party claims,<sup>3</sup> the insurance

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1. The survey period for this Article is approximately October 1, 2002 to September 30, 2003.

2. Other cases during the survey period are not analyzed within this article. *Bartlett v. State Farm Mut. Auto. Ins.*, 2002 WL 31741473 (S.D. Ind. 2002) (holding insurer entitled to summary judgment on claim for bad faith in handling underinsured motorist claim); *Tunny v. Erie Ins. Co.*, 790 N.E.2d 1009 (Ind. Ct. App. 2003) (holding underinsured motorist carrier not entitled for set off of worker's compensation payments reflecting amounts paid to insured's attorney); *Brady v. Allstate Indem. Co.*, 788 N.E.2d 916 (Ind. Ct. App. 2003) (holding underinsured motorist carrier did not commit bad faith on disputed value of claim); *State Farm Mut. Auto. Ins. Co. v. Steury*, 787 N.E.2d 465 (Ind. Ct. App. 2003) (holding insurer required to obtain written rejection of underinsured motorist coverage when policy was renewed after legislative amendment requiring offering of UIM coverage even though already rejected); *Microvote Corp. v. GRE Ins. Group*, 779 N.E.2d 94 (Ind. Ct. App. 2002) (holding CGL insurer owed no coverage for claim seeking replacement damages for insured's defective product); *State Farm Mut. Auto. Ins. Co. v. Leybman*, 777 N.E.2d 763 (Ind. Ct. App. 2002) (holding insured not entitled to uninsured motorist coverage when another liability insurance company offers policy limits, even if coverage is disputed); *Am. Family Mut. Ins. Co. v. Federated Mut. Ins. Co.*, 775 N.E.2d 1198 (Ind. Ct. App. 2002) (holding insurer's failure to obtain written rejection of uninsured motorist coverage entitled insured to uninsured motorist benefits equal to liability coverage limits).

3. A "third party" claim is one for insurance coverage being presented by a party who is not the insured or insurer. In other words, that claimant is a "third party" to the insurance contract. A

company files the declaratory judgment action in a separate court from the underlying claim that is being presented against the insured. However, in *Wilson v. Continental Casualty Co.*,<sup>4</sup> the court addressed the propriety of the third party claimant bringing the declaratory judgment action.

The third party claimant was an alleged victim of legal malpractice, who brought a lawsuit against his former attorney.<sup>5</sup> The attorney submitted the complaint to his legal malpractice carrier, who provided a defense to him under a reservation of rights.<sup>6</sup> However, the claimant filed a separate declaratory judgment lawsuit against the malpractice carrier, contending that the insurer was obligated to defend the attorney without a reservation of rights and to pay any amounts owed by the attorney for the lawsuit.<sup>7</sup> The malpractice insurer sought to dismiss the action contending it was prohibited by Indiana's rule against third parties bringing a direct action against an insurance company.<sup>8</sup>

The Indiana Court of Appeals reaffirmed the prohibition of direct actions by third parties against insurers, but distinguished a declaratory judgment action by the third party to determine insurance coverage.<sup>9</sup> The court recognized obstacles that may be faced by a claimant when an insurer is defending its insured under a reservation of rights:

A plaintiff is at a severe disadvantage when an insurance carrier chooses to defend an insured under a reservation of rights because at any time during the proceeding, even after the plaintiff has expended considerable time and resources, the insurance carrier can bring a declaratory action to establish that it does not have to indemnify the insured defendant.<sup>10</sup>

Allowing third parties to bring a declaratory judgment action to determine coverage when they have claims against an insured subject to a coverage question does not appear to significantly change the practical procedures for determining coverage. In order to have a judicial determination on coverage that is binding against all interested parties, most insurance companies already include the insured and the third party when a declaratory judgment action is filed.

However, a potential problem evolving from this decision is when third parties bring the declaratory judgment action in the same court as their existing claim against the insured. Such a practice presents a multitude of practical

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"first party" claim is one brought by the insured seeking coverage.

4. 778 N.E.2d 849 (Ind. Ct. App. 2002).

5. *Id.* at 850.

6. *Id.* An insurance company that provides a defense under a "reservation of rights," does so for the benefit of protecting itself from being collaterally estopped on issues that may be raised in the underlying tort action. See *Liberty Mut. Ins. Co. v. Metzler*, 586 N.E.2d 897 (Ind. Ct. App. 1992). It also prevents the insurer from potentially breaching the insurance policy or its duty of good faith owed to the insured. See *Wilson*, 778 N.E.2d at 852.

7. *Id.* at 850.

8. See *Menefee v. Schurr*, 751 N.E.2d 757 (Ind. Ct. App. 2001).

9. *Wilson*, 778 N.E.2d at 851-52.

10. *Id.* at 852.



problems, including making the litigation of declaratory judgment lawsuits more costly to insurance companies, as the company must now participate in all discovery even if irrelevant to the coverage issues.

More important is the potential for conflict that exists for the attorney hired by the insurance company to represent the insured. If the underlying lawsuit and declaratory judgment actions are combined, that defense attorney faces irreconcilable conflicts. Specifically, that attorney is being paid by the insurer to defend the insured, while the same insurance company is attempting to eliminate the insurance coverage being provided. The resolution of this potential conflict is to keep the declaratory judgment and underlying actions separate and distinct.

*B. Third Party Claimant's Rights to Insurance Proceeds Are Limited to the Insured's Rights*

The decision in *Wolverine Mutual Insurance v. Vance*,<sup>11</sup> presented a very interesting case concerning the rights of a third party claimant to insurance proceeds in a declaratory judgment proceeding. The named insured shot the third party claimant after an altercation. The shooting victim filed a lawsuit against the insured. The insured was also prosecuted and convicted of attempted murder.<sup>12</sup> Because the jury's determination of the insured's guilt included a requisite finding that the insured possessed the specific intent to injure the victim, the insured's homeowners insurance company filed a declaratory judgment action contending that it did not owe insurance coverage because the insured's actions were intentional and excluded under the policy.<sup>13</sup>

The insurance company filed a Motion for Summary Judgment that no liability coverage was available to the insured, relying in support upon the attempted murder conviction. The district court granted summary judgment to the insurance company, and the claimants appealed.<sup>14</sup> The appellate court agreed with the victim that it was not collaterally estopped to litigate the insured's intent because of the guilty plea verdict.<sup>15</sup> Although the insured was collaterally estopped to challenge the criminal court's finding of intent,<sup>16</sup> the victim was not a party to the criminal proceedings, and could still litigate the issue.<sup>17</sup>

However, the court expanded upon this principle in a very interesting way, upholding the district court's grant of summary judgment. The court determined that because Indiana is not a "direct action state," so that the shooting victim could not bring a direct civil lawsuit against the liability insurance company for damages, the shooting victim may only "stand in the legal shoes" of the insured

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11. 325 F.3d 939 (7th Cir. 2003).

12. *Id.* at 941-42.

13. *Id.* at 942.

14. *Id.* at 941.

15. *Id.* at 943.

16. *See Meridian Ins. Co. v. Zepeda*, 734 N.E.2d 1126 (Ind. Ct. App. 2000).

17. *Wolverine Mut. Ins.*, 325 F.3d at 943.

to seek indemnification from the insurer.<sup>18</sup> Consequently, because the insurance company's contractual duty flows only to the insured concerning the obligation of providing insurance coverage, the victim's rights to receive those proceeds was limited to the rights of the insured. Thus, if collateral estoppel applied to the insured where the criminal conviction collaterally estopped him from re-litigating the issue, summary judgment in favor of the insurer was still warranted because the victim had no greater rights than the insured.<sup>19</sup>

This decision appears to give little or no ability to the claimant to actually litigate the insured's intent. Even though the court says that the insured has the right to do so and is not collaterally estopped, the court then stated that because the victim had no greater rights than the insured who was collaterally estopped, the victim could not recover even if liability was established. It will be interesting to see how Indiana courts treat this ruling in declaratory judgment actions. If the Seventh Circuit's analysis is accepted, then insurers should be able to argue that collateral estoppel of the insured will also affect and limit the third party claimant's right as well.

## II. AUTOMOBILE CASES

### *A. Permissive Use of Vehicle*

The scope of insurance coverage available to a driver who is allegedly using a vehicle with permission was addressed in a number of decisions during the survey period. The question of the driver's operation of the vehicle and entitlement to coverage is a popular topic of litigation because of the unusual situations where drivers obtain the opportunity to drive automobiles.

In *American Family Insurance Co. v. Globe American Casualty Co.*,<sup>20</sup> the court addressed whether an intoxicated driver was entitled to coverage and whether the insurance company's issuance of an SR-22 form certifying proof of financial responsibility for the automobile,<sup>21</sup> overrode the policy provisions which limited the coverage. The owner of the vehicle granted permission to King's wife to use the owner's car, while King's wife's car was being repaired.<sup>22</sup> The owner did not grant permission to King to use the vehicle.<sup>23</sup>

On the day of the accident, King, while intoxicated, drove the vehicle, and collided with another motorist resulting in the motorist's death.<sup>24</sup> When

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18. *Id.* at 944.

19. *Id.*

20. 774 N.E.2d 932 (Ind. Ct. App. 2002).

21. The SR-22 form was created by Indiana's General Assembly for persons whose driving privileges have been suspended to demonstrate proof of financial responsibility under Indiana's Financial Responsibility Act, IND. CODE § 9-30-10-13 (2003), in order to obtain a driver's license. *Am. Family Ins. Co.*, 774 N.E.2d at 937.

22. *Id.* at 936.

23. *Id.*

24. *Id.* at 934.



insurance coverage was sought by King from the owner's policy for the lawsuit brought by the decedent, the owner's insurer filed a declaratory judgment contending that King was not an "insured" under the policy as he did not have permission to operate the automobile.<sup>25</sup>

The trial court granted summary judgment to the owner's insurance company determining that no insurance coverage was available, and the Indiana Court of Appeals affirmed.<sup>26</sup> While the court recognized that "implied permission" to use the automobile may exist by mere silence of the vehicle owner when initially supplying the vehicle to another,<sup>27</sup> the policy language at issue required the "express permission" of the owner in order for coverage to apply.<sup>28</sup> Because the vehicle owner never gave King express permission to operate the vehicle, he was not an "insured" under the policy to be afforded insurance coverage.<sup>29</sup>

The other interesting issue addressed by the appellate court focused upon the effect of the SR-22 form. One of the parties to the declaratory judgment proceedings argued that coverage existed for King, even if he did not qualify as an "insured," because the SR-22 form created a policy ambiguity.<sup>30</sup> Because the SR-22 form established the operator's proof of financial responsibility, the argument was made that it created "unconditional nonowned insurance coverage" for the operation of the vehicle.<sup>31</sup>

The appellate court rejected the argument that "unconditional" coverage was created or that an ambiguity existed within the policy.<sup>32</sup> The court observed that if such an argument was accepted, then insureds who received the SR-22 form possessed coverage greater than those under the policy who did not receive the form with the payment of no additional premium.<sup>33</sup> The purpose of the SR-22 form is merely "to inform the recipient . . . that insurance has been obtained; the certificate itself, however, is not the equivalent of an insurance policy."<sup>34</sup>

Another interesting permissive use decision focused upon whether the

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25. *Id.*

26. *Id.* at 941.

27. *See* *Am. Employers' Ins. Co. v. Cornell*, 76 N.E.2d 562 (Ind. 1948).

28. The policy defined "insured person" to include: "With respect to a car not owned by you, to be an insured person you must be using the car with the express permission of the owner and within the scope of such permission." *Am. Family Ins. Co.*, 774 N.E.2d at 936 (emphasis omitted).

29. *Id.*

30. Generally, the rules of insurance policy construction require an ambiguous insurance policy to be construed against the drafter of the policy, which is usually the insurance company, and in favor of the insured. *See Bosecker v. Westfield Ins. Co.*, 724 N.E.2d 241, 244 (Ind. 2000). However, in this case, the declaratory judgment action was between two insurance companies, instead of an insurance company and its insured, such that the court viewed the policy from a neutral stance. *Am. Family Ins. Co.*, 774 N.E.2d at 936.

31. *Id.* at 939.

32. *Id.*

33. *Id.*

34. *Id.* (quoting *Postlewait Constr. Co. v. Great Am. Ins. Co.*, 720 P.2d 805, 807 (Wash. 1986)).

vehicle owner's level of intoxication bears on his ability to give permission to another to operate a vehicle. In *Smith v. Cincinnati Insurance Co.*,<sup>35</sup> a vehicle owner's extreme intoxication was clearly evident to all who observed her. Allegedly, the vehicle owner gave permission to a fifteen year old driver who possessed only a learner's permit, and could not lawfully operate the vehicle without a guardian or relative accompanying her.<sup>36</sup> The young operator of the vehicle drove off the roadway and caused personal injuries to both the driver and the owner of the vehicle.

When the owner filed a complaint for personal injuries, the operator sought insurance coverage under the owner's policy.<sup>37</sup> The trial court and Indiana Court of Appeals found that coverage was excluded for the driver under the policy language as the young driver did not have a reasonable belief that she had permission to drive.<sup>38</sup> The Indiana Supreme Court agreed that the driver was not entitled to coverage.<sup>39</sup> The supreme court, quoting from the lower court's decision, determined a five part test should be used to determine whether a driver has a reasonable belief that she is entitled to driver another person's car:

- (1) [W]hether the driver has the express permission to use the vehicle;
- (2) [W]hether the driver's use of the vehicle exceeded the permission granted;
- (3) [W]hether the driver was legally entitled to drive under the laws of the applicable state;
- (4) [W]hether the driver had any ownership or possessory right to the vehicle; and
- (5) [W]hether there was some form of relationship between the driver and the insured, or one authorized to act on behalf of the insured, that would have caused the driver to believe that she was entitled to drive.<sup>40</sup>

Because the driver only possessed a learner's permit, the court concluded that she did not have a reasonable belief that she would be entitled to drive the owner's car.<sup>41</sup>

However, the court disagreed with a second ground cited by the Indiana Court of Appeals in its finding that no coverage existed. The court of appeals indicated that because the owner was extremely intoxicated when the permission was allegedly given, no reasonable person would have believed that the owner could have given permission.<sup>42</sup> Recognizing the strong public interest in

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35. 790 N.E.2d 460 (Ind. 2003).

36. *Id.* at 460; see IND. CODE § 9-24-7-4(2) (2003).

37. *Smith*, 790 N.E.2d at 461.

38. The policy excluded coverage for any person "[u]sing a vehicle without a reasonable belief that that person is entitled to do so." *Id.*

39. *Id.* at 462.

40. *Id.* at 461.

41. *Id.*

42. *Id.*



preventing intoxicated drivers from operating motor vehicles, the court found that an owner's level of intoxication should not be relevant in determining whether that owner may give permission to another to operate the vehicle:

Given the strong state and national interest of keeping persons who are intoxicated from operating motor vehicles, we think it sound policy to encourage sober drivers to get behind the wheel and not let their friends drive while drunk. It is true that a person may be so intoxicated that she may be unable to give her consent in other contexts. However, in the case of an intoxicated would-be driver, the level of sobriety should not prohibit another person from relying on the driver's request to operate her car. In essence, the fact that a would-be driver is extremely intoxicated has no bearing on whether she can nonetheless give her permission for a sober designated driver to drive her car.<sup>43</sup>

The supreme court clearly felt it necessary to recognize the strong public interest against intoxicated drivers operating motor vehicles.

In another case addressing permissive use of a vehicle, the U.S. Court of Appeals for the Seventh Circuit determined that no permission existed to a driver who was unlicensed in violation of a written agreement. In *Vanliner Insurance Co. v. Sampat*,<sup>44</sup> the named insured was a storage company. The storage company entered into an operating agreement with a truck driver where the driver provided the transportation to pull the storage company's trailers.<sup>45</sup> The agreement authorized the driver to use other individuals to drive the vehicle if they were "properly licensed."<sup>46</sup> When the driver became ill, he asked another individual accompanying him on a trip as a loader to operate the tractor, even though the individual was not licensed.<sup>47</sup> The substitute driver caused an automobile accident resulting in serious personal injuries.<sup>48</sup>

A declaratory judgment action was brought to determine the obligation of the storage company's insurer to provide coverage to the substitute driver for the personal injury lawsuit brought against him.<sup>49</sup> The focus of the action was whether the unlicensed driver of the vehicle had the permission of the named insured, the storage company, to be entitled to coverage.<sup>50</sup>

While noting that Indiana follows the "liberal" rule in determining implied permission,<sup>51</sup> the court concluded that the unlicensed driver did not have permission to be afforded coverage. Because the contractor agreement expressly required drivers to be properly licensed, the court could not imply permission for

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43. *Id.* at 462.

44. 320 F.3d 709 (7th Cir. 2003).

45. *Id.* at 710.

46. *Id.* at 713.

47. *Id.*

48. *Id.* at 710.

49. *Id.*

50. *Id.* at 712.

51. *Id.* at 713.

the unlicensed driver to use the vehicle in satisfaction of the liberal rule.<sup>52</sup> Consequently, there was no coverage available under the storage company's policy for the unlicensed driver.<sup>53</sup>

Each of these "permissive use" cases demonstrate that the court will apply the "liberal" rule concerning permission, but will not deviate from express restrictions placed upon the permission of using the vehicle. Thus, in addressing these types of cases, special focus needs to be given to the initial granting of permission to see if there are any restrictions that prevent application of the "liberal" rule.

*B. As a Matter of Law, Court Refuses to Find Lack of Uninsured Motorist Coverage for Insured's Collision with "Debris" in Roadway*

The *Will v. Meridian Insurance Group, Inc.*<sup>54</sup> decision is a case addressing the existence of uninsured motorist coverage for an insured's accident with an unknown driver and object. The insured was driving her automobile and collided with a pile of roofing materials.<sup>55</sup> In attempting to avoid the debris pile, the insured sustained injury as a result of the rollover of her vehicle.<sup>56</sup>

In order for uninsured motorist coverage to apply, the insured must have collided with a "hit-and-run vehicle."<sup>57</sup> The court recognized the purpose of such a policy provision is to prevent fraudulent claims by insureds from alleged accidents with unknown hit and run drivers.<sup>58</sup> However, the court observed that "indirect contact" with a vehicle may satisfy the "hit and run" requirements.<sup>59</sup> The court indicated that "indirect contact" occurs when a "continued transmission of force indirectly and contemporaneously [causes contact] through an intermediate object."<sup>60</sup>

The trial court granted the uninsured motorist insurer's summary judgment motion which asked the court to rule as a matter of law that the insured's collision with the debris did not satisfy the policy definition for "hit and run vehicle."<sup>61</sup> However, the appellate court reversed the trial court.<sup>62</sup> The court simply found that the designated evidence for the summary judgment motion did not establish an absence of genuine issues of material fact on the continuous sequence and chain of events concerning the origin of the debris.<sup>63</sup> While

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52. *Id.*

53. *Id.*

54. 776 N.E.2d 1233 (Ind. Ct. App. 2002).

55. The opinion describes the pile as "four to five f[et]t" high. *Id.* at 1234.

56. *Id.*

57. *Id.*

58. *Id.* at 1236; see also *Allied Fid. Ins. Co. v. Lamb*, 361 N.E.2d 174 (Ind. App. 1977).

59. *Will*, 776 N.E.2d at 1236.

60. *Id.* at 1235 (quoting *Lamb*, 361 N.E.2d at 177).

61. *Id.*

62. *Id.* at 1239.

63. *Id.*



summary judgment for the insurer was reversed, the court observed that the insured will have a heavy burden to show an entitlement of coverage.<sup>64</sup>

The conclusion of the court is unusual. While generally insureds who seek coverage must establish an entitlement as part of their burden of proof to recover for a claim under the policy, it seems that the court has placed an almost impossible burden upon the underinsured motorist insurer to be entitled to summary judgment. Because the policy required a “hit and run vehicle,” the insurer in this case clearly established that the undisputed facts demonstrated that there was no collision with a “hit and run vehicle” even under the “indirect physical contact” rule to establish coverage. Once the insurer demonstrated the policy terms were not satisfied, the burden should have shifted to the insured to present some evidence to create a genuine issue of material fact that there was “indirect physical contact” with a “hit and run vehicle” to demonstrate coverage.<sup>65</sup> This decision will limit an insurer’s ability to seek summary judgment when the insured cannot show an entitlement to coverage.

In a similar case, the United States District Court for the Northern District of Indiana ruled for an insurer concerning a lack of uninsured motorist coverage for the insured’s vehicle collision with abandoned semi truck tires along the side of the road. In *Northland Insurance Co. v. Gray*,<sup>66</sup> the insureds sought uninsured motorist coverage from their carrier when their vehicle’s tire sustained a blow out, and the vehicle veered off the side of the road and struck the abandoned semi truck tires.<sup>67</sup> The uninsured motorist carrier filed a declaratory judgment action to contend that no coverage was available because the insureds did not have an accident with a “hit and run vehicle.”<sup>68</sup> The insured moved to dismiss the declaratory judgment action by contending that it was improperly brought by the insurer without an “actual controversy,”<sup>69</sup> and that the insurer was depriving the insureds of their ability to choose the forum to seek relief.<sup>70</sup>

The district court rejected the insureds’ arguments seeking dismissal.<sup>71</sup> Additionally, the court determined, as a matter of law, that no uninsured motorist coverage was available to the insureds because their accident did not involve a

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64. *Id.*

65. The court defined “indirect physical conduct” as “‘when an unidentified vehicle strikes an object impelling it to strike the insured automobile and a substantial nexus between the unidentified vehicle and the intermediate object is established.’” *Id.* at 1236 (quoting *Lamb*, 361 N.E.2d at 179).

66. 240 F. Supp. 2d 846 (N.D. Ind. 2003).

67. *Id.*

68. The specific policy provision at issue stated: “‘Uninsured motorist vehicle’ means a land motor vehicle or trailer . . . [w]hich is a hit-and-run vehicle and neither the driver nor the owner can be identified. A hit-and-run vehicle is one that causes ‘bodily injury’ to an ‘insured’ by hitting the ‘insured,’ a covered ‘auto’ or vehicle and ‘insured’ is ‘occupying.’” *Id.* at 849.

69. The Federal Declaratory Judgment Act, 28 U.S.C. § 2201 (2003), requires an “actual controversy” exist between the parties to the litigation.

70. *Gray*, 240 F. Supp. 2d at 848.

71. *Id.* at 850.

“hit-and-run vehicle” which was necessary to satisfy the definition of “uninsured motor vehicle.”<sup>72</sup> This decision appears to be a correct analysis, although it is surprising that the court ruled as a matter of law when the insureds had filed a motion to dismiss the action.

*C. Uninsured Motorist Coverage Not Available for Accidental Discharge of Paintball Gun Inside Vehicle*

An interesting factual case ending in unfortunate results occurred in *Sizemore v. Erie Insurance Exchange*,<sup>73</sup> where the claimant sustained a serious eye injury as a result of the discharge of a paint gun. On the date of the accident, some young men were riding in a car with two paintball guns.<sup>74</sup> They met a friend, and stopped the car to talk.<sup>75</sup> The friend stuck his head inside the front passenger window, and as he did so, one of the paintball guns fired.<sup>76</sup> The friend was struck in the eye, resulting in its removal and replacement with a prosthetic eye.<sup>77</sup> The occupants of the car believe that the safety of the gun was activated, but it apparently discharged when they placed the gun on top of the right front passenger seat of the car.<sup>78</sup>

The driver of the vehicle when the accident happened was uninsured.<sup>79</sup> Consequently, the friend presented an uninsured motorist claim to his own insurance company seeking coverage for his injuries.<sup>80</sup>

The insurer denied that it owed any uninsured motorist coverage because there was no causal connection between the incident and the user’s operation of a motor vehicle. Specifically, before coverage existed, there must have been a “motor vehicle accident.”<sup>81</sup> The trial court and court of appeals both agreed with the insurer that no coverage existed.<sup>82</sup> In order for coverage to apply, the court felt that the use of the vehicle must be the “the efficient and predominating cause

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72. *Id.*

73. 789 N.E.2d 1037 (Ind. Ct. App. 2003).

74. *Id.* at 1038.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. The policy’s language provided:

We will pay for damages for bodily injury and property damage that the law entitles you or your legal representative to recover from the owner or operator of an uninsured motor vehicle or underinsured motor vehicle. Damages must result from a motor vehicle accident arising out of the ownership or use of the uninsured motor vehicle or underinsured motor vehicle as a motor vehicle.

*Id.* at 1039.

82. *Id.*



of the accident.”<sup>83</sup> Because the undisputed facts demonstrated that the only connection of the uninsured vehicle was that the paintball gun happened to rest against the passenger’s seat, the court concluded that the automobile only “remotely contributed” to causing the friend’s injuries.<sup>84</sup> Likewise, the court found that the applicable policy language clearly required “motor vehicle accident,” and because no motor vehicle accident occurred, an additional ground existed to deny coverage.<sup>85</sup>

This case enforces earlier Indiana decisions addressing unusual circumstances in attempts to seek application of uninsured motorist coverage in automobile policies. The courts require that the automobile accident be the “efficient and predominating cause” of the claimant’s injuries before the automobile policy will apply. If the use of an automobile only remotely contributes to the cause, then the automobile policy is not the proper policy to respond.

*E. Underinsured Motorist Coverage Not Available for Loss of Consortium Claim for Death of Adult Child*

In *Armstrong v. Federated Mutual Insurance Co.*,<sup>86</sup> the insureds were parents of a daughter killed in an automobile accident. As a result of her death, the daughter’s estate received the full policy limits available to the tortfeasor that caused her death.<sup>87</sup> The parents of the daughter sought damages for the “loss of love and companionship” of their daughter from their underinsured motorist coverage.<sup>88</sup> The major issue addressed by the court was whether damages for “loss of love and companionship” met the definition of “bodily injury”<sup>89</sup> to afford coverage.

The court initially concluded that the policy’s definition of “bodily injury” did not include the emotional-type damages presented in a claim for “loss of love and companionship.”<sup>90</sup> The court also distinguished other Indiana cases which may have suggested that emotional damages may satisfy the definition of “bodily injury” in a policy with an identical policy definition.<sup>91</sup> In this particular case,

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83. *Id.* at 1040 (citing *Ind. Lumberman’s Mut. Ins. Co. v. Stateman Ins. Co.*, 291 N.E.2d 897 (Ind. 1973)).

84. *Id.*

85. *Id.*

86. 785 N.E.2d 284 (Ind. Ct. App. 2003).

87. *Id.* at 286.

88. *Id.* at 292.

89. The policy defined “bodily injury” to mean “bodily harm, sickness or disease, including death that results.” *Id.*

90. *Id.*

91. In *Wayne Township Board of School Commissioners v. Indiana Insurance Co.*, 650 N.E.2d 1205 (Ind. Ct. App. 1995), the court determined that the “bodily injury” included the emotional trauma suffered by a child molestation victim because the victim sustained a physical impact which was inherent in the crime of child molestation. *Armstrong*, 785 N.E.2d at 293.

the parents who lost their adult daughter did not sustain a "bodily injury" as defined by the policy to be entitled to damages for the "loss of love and companionship" under the policy.<sup>92</sup> Their claim for damages did not involve any bodily impact necessary to satisfy the definition of "bodily injury."<sup>93</sup>

This case is important in demonstrating that claims devoted strictly to loss of love and companionship will not be proper to recover under uninsured/underinsured motorist policies. Until this case was decided, there existed some uncertainty concerning an insured's right to pursue such a claim.<sup>94</sup>

*F. Listed Driver on Policy Is Not Same as "Insured" to Be Entitled to Uninsured Motorist Coverage*

An individual who was identified as a "listed driver" under a policy was not considered an "insured" as that term was defined within the policy to be afforded uninsured motorist coverage in the case of *Puryear v. Progressive Northern Insurance Co.*<sup>95</sup> A roommate purchased an automobile policy and was the only named insured.<sup>96</sup> However, the named insured's "roommate" was identified as a "listed driver" on the policy.<sup>97</sup> The roommate was seriously injured as a pedestrian by a hit and run driver and sought uninsured motorist coverage from the roommate's policy.<sup>98</sup>

The roommate contended that his status as a "listed driver" made him entitled to receive uninsured motorist coverage under the policy.<sup>99</sup> However, the court rejected that argument by reviewing the definition of "insured person,"<sup>100</sup> and concluded the roommate was not entitled to uninsured motorist coverage. The court also rejected the roommate's argument that the policy was ambiguous from its inclusion of "listed drivers" and "insureds."<sup>101</sup>

A similar conclusion was decided in *Little v. Progressive Insurance*.<sup>102</sup> The named insured acquired an automobile policy and completed the necessary forms

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92. *Id.*

93. *Id.*

94. The case also has a very instructional discussion on when jury instructions may be used to define insurance policy terms that will be decided by the jury. For instance, the court determined that the term "resident" as used within the insurance policy, did not require a jury instruction as it was "neither legal nor technical in nature, and is widely used and understood by the average juror." *Id.* at 288.

95. 790 N.E.2d 138 (Ind. Ct. App. 2003).

96. *Id.* at 139.

97. *Id.* The purpose of having "listed drivers" is to remove any uncertainty of whether such a person has permission to use the vehicle.

98. *Id.*

99. *Id.* at 140.

100. Policy defined "insured person" to mean the named insured, a relative of the named insured, and any person occupying a covered vehicle. *Id.*

101. *Id.* at 141.

102. 783 N.E.2d 307 (Ind. Ct. App. 2003).



to properly reject uninsured and underinsured motorist coverages in accordance with the Indiana statute.<sup>103</sup> After the policy was issued, the named insured requested that the insurance company add another individual as a “driver” on the policy.<sup>104</sup> When the insurance company received the request, it sent a form for the rejection of uninsured and underinsured motorist coverage to the named insured.<sup>105</sup> Neither the named insured nor the listed driver signed or returned the rejection form.<sup>106</sup> Later, the listed driver was involved in an automobile accident with an uninsured motorist, and sought uninsured motorist benefits under the policy, and the insurance company denied the claim.<sup>107</sup>

After the listed driver filed a complaint against the uninsured motorist carrier, the carrier responded with a Motion for Summary Judgment which was granted by the trial court.<sup>108</sup> The court discussed extensively that an individual identified as a “listed driver” is not the same as a “named insured” under the policy.<sup>109</sup> The court found that the only individuals entitled to uninsured motorist coverage were those who met the definition of “insured” under the policy.<sup>110</sup> Because the new “listed driver” did not satisfy that definition, no uninsured motorist coverage was available.<sup>111</sup>

Furthermore, the court found that the failure of either the named insured or the listed driver to complete and return the rejection form was not significant.<sup>112</sup> Specifically, the court found that the named insured was the only individual entitled to accept or reject the uninsured/underinsured motorist coverage.<sup>113</sup> The court also refused to find that the insurance company’s submission of the second form after the named insured added the listed driver to the policy created any type of equitable estoppel for the insurance company to deny coverage.<sup>114</sup> This decision reinforces the policy language that affords coverage only to “insureds.” Although others may be identified as “listed drivers” for purposes of the insurance company to establish permission to operate the automobile, those individuals do not automatically become “insureds” entitled to the benefits of the coverage, unless they are specifically identified as “insureds” and premium is

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103. *Id.* at 300; IND. CODE § 27-7-5-2(a) (2003) (providing that the “named insured” possesses a right to reject either or both uninsured and underinsured motorist coverage).

104. 783 N.E.2d at 309.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 309-10.

109. *Id.* at 311. The court observed that one legal treatise provided that “one listed in the policy, but only in the status of driver of the vehicle, is not a named insured despite the fact that such person’s name was physically in the policy.” *Id.* (quoting LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 110:1 (3d ed. 1997)).

110. *Id.* at 312.

111. *Id.* at 313.

112. *Id.*

113. *Id.*

114. *Id.* at 315.

paid for their inclusion.

*G. Husband's Rejection of Uninsured Motorist Coverage  
Did Not Apply to Wife*

In *State Farm Fire & Casualty Co. v. Garrett*,<sup>115</sup> a husband acquired a personal umbrella policy for him and his wife.<sup>116</sup> At the time of acquisition, the husband completed a form rejecting uninsured motorist coverage, but no form was completed by his wife.<sup>117</sup> The wife was fatally injured in an automobile accident, and her estate, with her husband as personal representative, sought uninsured motorist coverage.<sup>118</sup>

The uninsured motorist insurer made three arguments to suggest that no uninsured motorist coverage was available to the wife's estate. The insurer argued that because any uninsured motorist coverage would directly benefit the husband, the husband's rejection of uninsured motorist coverage should apply to the estate's claim.<sup>119</sup> Second, the insurer argued that because of their husband and wife status, an agency relationship existed such that the husband's execution of the rejection also applied to any claim by the wife or her estate.<sup>120</sup> Lastly, the insurance company argued that the legislature amended the statute to allow any named insured's rejection to encompass all insureds.<sup>121</sup>

The trial court and court of appeals rejected each of these arguments. The court engaged in a lengthy review and analysis of Indiana's uninsured motorist statute<sup>122</sup> to interpret whether the various arguments raised by the insurer were correct. Finding that the husband's rejection could not be binding upon the claim presented by the wife's estate, the court determined that uninsured motorist coverage was available for the wife's death.<sup>123</sup>

This case contained a very good analysis by the court on the procedures required for rejection of the uninsured motorist coverage. With Indiana's legislative change allowing one named insured to reject coverage for all others,<sup>124</sup> this decision may have only a limited impact on cases. However, it does appear to correctly interpret the facts of this case that the husband's rejection could not

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115. 783 N.E.2d 329 (Ind. Ct. App. 2003).

116. *Id.* at 331.

117. *Id.*

118. *Id.*

119. *Id.* at 333-34.

120. *Id.* at 334.

121. Specifically, in 1999, the legislature amended Indiana Code section 27-7-5-2(b) to state "any named insured of an automobile or motor vehicle liability policy has the right, *on behalf of all other named insureds and all other insureds*, in writing, to: (1) reject both the uninsured motorist coverage and the underinsured motorist coverage provided for in this section. . . ." *Id.* at 337 (citing IND. CODE § 27-7-5-2(b) (1982) (amended 1999)).

122. IND. CODE § 27-7-5-2 (1982) (amended 1999).

123. *State Farm Fire & Cas. Co.*, 783 N.E.2d at 338.

124. IND. CODE § 27-7-5-2(b).



encompass the claim of the wife or her estate.

*H. Cancellation of Auto Policy Was Effective Despite Providing of Earlier Notice to Agent*

During this survey period, two cases addressed cancellation of automobile policies for non-payment of premium. In each, the cancellation was challenged because notice of the cancellation was not previously provided to the insurance agent in accordance with the requirements of an Indiana statute.<sup>125</sup> In *Krueger v. Hogan*,<sup>126</sup> an insured stopped making premium payments on his automobile policy. The insurance company mailed notification to the named insured of its intent to cancel the policy if the premium was not received.<sup>127</sup> However, the carrier failed to mail the notice to the insurance agent as required by the statute.<sup>128</sup> The undisputed evidence had disclosed that the insured was aware that the insurance company would cancel the policy if premium payment was not provided.<sup>129</sup>

The injured was involved in an automobile accident resulting in the wrongful death of another motorist. When the named insured's liability insurer contended that the policy was canceled and refused to provide coverage for the motorist's lawsuit against the insured, a declaratory judgment action proceeded between the insurance company and the decedent's estate.<sup>130</sup>

The trial court and appellate court agreed that no coverage was available and that the insurance company properly canceled the policy despite its failure to strictly comply with the statute when it failed to provide notice to the agent.<sup>131</sup> The court observed that the primary purpose for the legislature to require notice to the agent is to make sure that sufficient notice of the cancellation is given to the insured.<sup>132</sup> The facts in this case reveal that the insured had actual notice that

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125. Indiana Code section 27-7-6-5 states in relevant part:

No notice of cancellation of a policy to which section 4 (Ind. Code 27-7-6-4) of this chapter applies shall be effective unless mailed or delivered by the insurer to the named insured at least twenty (20) days prior to the effective date of cancellation; provided, however, that where cancellation is for nonpayment of premium at least ten (10) days notice accompanied by the reason therefore shall be given. *In the event such policy was procured by an insurance producer duly licensed by the state of Indiana, notice of intent to cancel shall be mailed or delivered to such insurance producer at least ten (10) days prior to such mailing or delivery to the named insured unless such notice of intent is or has been waived in writing by the insurance producer.*

IND. CODE § 27-7-6-5 (2003) (emphasis added).

126. 780 N.E.2d 1199 (Ind. Ct. App. 2003).

127. *Id.*

128. *Id.* at 1200.

129. *Id.* at 1202.

130. *Id.* at 1200.

131. *Id.*

132. *Id.*

the policy would be canceled, such that the additional requirement that notice be given to the insurance agent was unneeded.<sup>133</sup> Thus, even though the insurer failed to strictly follow the statute, it was not a bar to the policy still being canceled.<sup>134</sup>

A similar decision was reached in *American Standard Insurance Co. v. Rogers*,<sup>135</sup> where a permissive user was involved in a automobile accident while driving the named insured's automobile. A personal injury claim arose as a result of that accident against the permissive user. However, the insurance company for the car owner denied coverage to the permissive user by contending that the policy had been canceled approximately two months before the accident for the named insured's failure to provide a premium payment.<sup>136</sup>

The issue before the court was whether the insurance company properly canceled the policy and whether it was estopped from relying upon the cancellation of the policy based upon its prior conduct in accepting partial payments from the named insured. The facts demonstrated that the named insured had made partial payments a number of times when premium was due, resulting in the policy being extended.<sup>137</sup>

However, in the weeks shortly before the policy cancellation, the insured was provided notice by the insurer that a significant past due balance was owed, and that the policy would be canceled on a certain date if the full amount was not received.<sup>138</sup> Less than two weeks before the policy's effective cancellation date, the insurance company sent cancellation letters to the insured and the agent.<sup>139</sup> This letter did not explicitly comply with the Indiana statute on cancellation, as notice of at least ten days was not provided to the insurance agent.<sup>140</sup>

The court first determined that the insurance company did not waive its ability to cancel the policy by accepting previous partial payments from the insured.<sup>141</sup> The court found that the insurance company sufficiently advised the insured by its notice of cancellation that full payment by the insured was needed in order for the policy to continue.<sup>142</sup> The court found that there was no conduct on the part of the insurance company that misled the insured to believe that its policy would have been extended to cover the date of this accident without the insured paying a premium.<sup>143</sup>

Furthermore, the court found that the insurance company's lack of strict compliance with the cancellation statute by failing to give the insurance agent

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133. *Id.*

134. *Id.*

135. 788 N.E.2d 873 (Ind. Ct. App. 2003).

136. *Id.* at 875.

137. *Id.* at 877.

138. *Id.*

139. *Id.*

140. *Id.*; see IND. CODE § 27-7-6-5 (2003).

141. *Am. Standard Ins. Co.*, 788 N.E.2d at 878.

142. *Id.*

143. *Id.* at 879.



notice of the cancellation ten days before delivery to the named insured did not foreclose the insurer from canceling the policy.<sup>144</sup> As in *Kruger v. Hogan*,<sup>145</sup> the court found that strict compliance with the statute would not serve the intent and purpose of the statute.<sup>146</sup> The court found that the named insured was well aware that his policy was canceled and that additional notice being given to his insurance agent would not have served any purpose in extending the coverage.<sup>147</sup>

### III. COMMERCIAL AND HOMEOWNER CASES

#### A. Homeowners' Policy Did Not Cover Liability for Boat Dislodged from Trailer

*Vann v. United Farm Family Mutual Insurance Co.*,<sup>148</sup> addressed the application of a motor vehicle exclusion in a homeowner's policy. While on the interstate, the insured was pulling a trailer that carried a boat behind his truck. The trailer became detached, crossed the interstate, and smashed into an oncoming vehicle. Upon impact with the other vehicle, the boat dislodged from the trailer and rammed into the cab of the oncoming vehicle resulting in serious injuries to the occupant.<sup>149</sup> The injured victim filed a personal injury lawsuit against the driver of the truck that pulled the trailer, and the driver sought liability insurance coverage under his homeowners' policy.<sup>150</sup>

The homeowner's insurance carrier filed a motion for summary judgment in the declaratory judgment proceedings asking the court to construe the policy's automobile exclusion<sup>151</sup> to preclude coverage. The trial court granted summary judgment in favor of the insurer, finding that there was no coverage.<sup>152</sup> On appeal, the court agreed that no coverage existed.<sup>153</sup> The appellate court determined that the driver's truck and trailer each satisfied the definition of "motor vehicle" within the policy and, thus, came within the applicable

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144. *Id.* at 880.

145. 780 N.E.2d 1199 (Ind. Ct. App. 2003).

146. *Am. Standard Ins. Co.*, 788 N.E.2d at 880.

147. *Id.*

148. 790 N.E.2d 497 (Ind. Ct. App. 2003).

149. *Id.* at 499-500.

150. *Id.*

151. *Id.* at 500. The lengthy exclusion at issue provided, in relevant part, that policy coverage did not apply to claims seeking recovery for bodily injury or property damage arising out of "the ownership, maintenance, use, loading, unloading or entrustment of (1) a motor vehicle . . . or (2) a watercraft . . ." *Id.*

152. *Id.* at 501.

153. *Id.* at 504. Interestingly, the court of appeals had reversed the trial court in an earlier decision that was subsequently reversed by the Indiana Supreme Court. See *Vann v. United Farm Bureau Mut. Ins. Co.*, 778 N.E.2d 869 (Ind. Ct. App. 2002), *trans. granted*, 792 N.E.2d 41 (Ind. 2003).

exclusion.<sup>154</sup>

The court appears to have correctly determined that no homeowners insurance coverage should apply for this event which clearly did not involve the operation of the boat nor have any connection with the risk intended to be covered by a homeowners' policy. Clearly, the insured's motor vehicle insurance is the proper policy to respond to any liability for the trailer.

*B. As Long as Insurer Had "Rational Basis" to Decline Claim, Insurer Did Not Commit Bad Faith*

Indiana law has firmly established that insurance companies owe a legal duty to their insureds to deal in good faith with any claims presented by the insured.<sup>155</sup> However, simply because the insurance company denies the insured's claim does not automatically show that the insurance company committed bad faith.<sup>156</sup> Instead, to demonstrate bad faith, the insured must establish, by clear and convincing evidence, that the insurance company had knowledge that there was no legitimate basis for denying liability.<sup>157</sup>

The decision of *Masonic Temple Ass'n v. Indiana Farmers Mutual Insurance Co.*<sup>158</sup> provides an excellent analysis by the court showing that a good faith disagreement between the insured and the insurance company concerning the extent of liability does not translate into a claim for the insurance company's breach of the duty of good faith.<sup>159</sup> Instead, so long as the insurance company presented a "rational basis" to support its position, no breach of the duty of good faith existed.<sup>160</sup>

In *Masonic Temple*, the insured sustained damage to one of its buildings. The insured contended that the damage to the building was caused by faulty construction excavation and therefore constituted a covered loss.<sup>161</sup> The insurer contended that coverage was excluded under of an "earth movement" exclusion and that coverage would only be allowed if there was a total collapse of the building.<sup>162</sup>

The insured brought a breach of contract action against the insurance company and also asserted a claim for bad faith denial of claim and sought to recover punitive damages.<sup>163</sup> Even though the determination of the coverage question was not resolved, the insurance company filed a motion for partial

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154. *Vann*, 790 N.E.2d at 503.

155. *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515 (Ind. 1993).

156. *Id.* at 520.

157. *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37, 40 (Ind. 2002).

158. 779 N.E.2d 21 (Ind. Ct. App. 2002).

159. *Id.* at 26.

160. *Id.* at 27.

161. *Id.* at 25.

162. *Id.*

163. *Id.*



summary judgment on the insured's bad faith and punitive damages claims.<sup>164</sup> Following the trial court's granting of partial summary judgment to the insurance company, an appeal ensued.<sup>165</sup>

The court found that the insurance company presented a rational basis to support its position.<sup>166</sup> Specifically, the court observed that no Indiana cases addressed the exact policy language at issue in the case.<sup>167</sup> The court rejected the insured's contention that the absence of controlling authority to support the insurance company's position presented a basis to find bad faith on the part of the insurance company.<sup>168</sup> The court specifically found that even if the insurance company was wrong in its position on the denial of the coverage, the insured could not seek punitive damages or prove bad faith without a showing that the insurance company lacked any rational basis to take the position it did.<sup>169</sup>

This decision provides support for an insurance company's ability to challenge a claim for coverage without having the fear of a breach of duty of good faith lawsuit being asserted against it. As long as the insurance company presents a "rational basis" for its position, no bad faith action will be permitted.

### *C. CGL Policy Did Not Cover Claims of Faulty Workmanship in Construction of Home Center*

In *Jim Barna Log Systems Midwest, Inc. v. General Casualty Insurance Co.*,<sup>170</sup> the buyer of a log package sued the seller for negligent hiring of the home builder, negligent misrepresentation of the competency of the builder and conversion. The seller sought coverage under a commercial general liability (CGL) policy that it possessed.<sup>171</sup> The CGL insurance company denied coverage, contending that there was no triggering occurrence<sup>172</sup> within the meaning of the policy.

The trial court granted summary judgment in favor of the insurance company, and the appellate court affirmed.<sup>173</sup> Although the allegations made against the seller suggested the seller was negligent, the court observed that "an allegation of negligence is not necessarily an allegation of accidental conduct as defined in the context of a commercial general liability insurance policy."<sup>174</sup>

The court examined each of the counts asserted against the seller and

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164. *Id.*

165. *Id.*

166. *Id.* at 28-29.

167. *Id.* at 29.

168. *Id.*

169. *Id.* at 30.

170. 791 N.E.2d 816 (Ind. Ct. App. 2003).

171. *Id.* at 821.

172. *Id.* An "occurrence" was defined to mean "an accident including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 822.

173. *Id.* at 819-20.

174. *Id.* at 825.

concluded that there was no accidental conduct to demonstrate an "occurrence" that would establish liability coverage.<sup>175</sup> Furthermore, the court found that no coverage existed because of multiple exclusions.<sup>176</sup> The most pertinent exclusion focused upon the "damage to your product" exclusion.<sup>177</sup> The allegations set forth in the buyer's complaint fell under this exclusion because the complaint sought damages for inadequate construction of the log home.<sup>178</sup>

The *Jim Barna* decision is another case that reinforces the limitations on the scope of coverage provided by a CGL policy for a claim of faulty workmanship. As the courts have repeatedly stated: "CGL policies cover the possibility that the goods, products, or work of the insured, once relinquished or completed, will cause bodily injury or damage to property *other than* to the product or completed work itself, and for which injury or damage the insured might be exposed to liability."<sup>179</sup>

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175. *Id.* at 829.

176. *Id.*

177. *Id.* at 827. This exclusion provides that insurance coverage does not apply to "'property damage' to 'your product' arising out of it or any part of it." *Id.*

178. *Id.* at 828.

179. *R.N. Thompson & Assocs., Inc. v. Monroe Guar. Ins. Co.*, 686 N.E.2d 160, 162 (Ind. Ct. App. 1997) (emphasis in original).



# RECENT DEVELOPMENTS IN INTELLECTUAL PROPERTY LAW

CHRISTOPHER A. BROWN\*

Notable cases concerning trade dress and patent claim interpretation were among the case law published in the period October 1, 2002 through September 30, 2003. Additionally, a bill was introduced in the Indiana General Assembly to overhaul the Indiana Trademark Act to track the provisions of the Model State Trademark Act. Each of these items will be of interest to Indiana in-house and private practitioners, and their employers or clients, in creating and protecting market share for new or established products.

## I. *ECO V. HONEYWELL*

The United States District Court for the Southern District of Indiana saw an interesting trade dress case pitting Honeywell, Inc. and its assertion of protection for a round thermostat against Eco Manufacturing, Inc. and its assertion of competitive freedom. Relying on recent cases clarifying trade dress law and its limitations, the court found that protection for the round thermostat, which had been the subject of prior utility and design patent protection, was not available under the Lanham Act.

### A. *Background: Lanham Act, Wal-Mart v. Samara Bros., TrafFix Devices, Inc.*

Section 43(a) of the Lanham Act provides a cause of action for one who believes he or she will be damaged against the use by another of “any word, term, name, symbol, or device, or any combination thereof . . . which is likely to cause confusion . . . as to the origin, sponsorship, or approval of his or her goods . . . .”<sup>1</sup> Among other things, this section provides the basis for suits for trade dress infringement. The term “trade dress” comprehends features of a product or its packaging, as opposed to “trademark,” which commonly connotes a word, phrase, picture, or logo. Trade dress is generally protectible against others’ later uses that are likely to cause consumer confusion, if the trade dress is sufficiently distinctive to merit protection and is not functional.

Into the 1990s, Section 43(a) had been generally interpreted to reach a relatively wide variety of protectible property and infringing conduct. However, the Supreme Court in *Wal-Mart Stores, Inc. v. Samara Bros.*,<sup>2</sup> began reining in trade dress law, a trend continued in *TrafFix Devices, Inc. v. Marketing Displays, Inc.*<sup>3</sup> The *Wal-Mart* case centered around articles of clothing designed by respondent Samara. Samara brought suit against Wal-Mart under section 43(a),

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1. 15 U.S.C. § 1125(a) (2003).

2. 529 U.S. 205 (2000).

3. 532 U.S. 23 (2001); *see infra* notes 16-36 and accompanying text.

alleging that Wal-Mart had improperly copied its clothing designs.<sup>4</sup> Wal-Mart had sent photographs of Samara's clothing to a foreign maker, who copied the photographs with "minor" modifications in making clothing for Wal-Mart. After the district court found against Wal-Mart and rejected its post-trial motion that Samara's designs were not protectible, which determinations were upheld by the Second Circuit, the Supreme Court weighed in.

The Court, after reviewing the pertinent parts of the Lanham Act, its historically broad interpretation, and the open issues or ambiguities in it, proceeded to discuss the concept of "distinctiveness" in trademark law.<sup>5</sup> Citing its previous decision in *Two Pesos, Inc. v. Taco Cabana, Inc.*,<sup>6</sup> the Court noted that "the general principles qualifying a mark for registration under . . . the Lanham Act are for the most part applicable in determining whether an unregistered mark is entitled to protection under §43(a)."<sup>7</sup> Accordingly, to be protectible, unregistered material such as trade dress must be distinctive.<sup>8</sup>

In the realm of word trademarks, for example, to be entitled to registration a word must be either inherently distinctive—its "intrinsic nature serves to identify a particular source,"<sup>9</sup>—or if not inherently distinctive, it must have "acquired distinctiveness."<sup>10</sup> A mark has acquired distinctiveness if its "primary significance . . . is to identify the source of the product rather than the product itself."<sup>11</sup> However, the *Wal-Mart* Court decided that a product's design, like its color,<sup>12</sup> can never be inherently distinctive.<sup>13</sup> Consequently, every trade dress claim concerning the design of a product must include proof that the primary significance of the trade dress feature is to identify the source of the product rather than the product itself.<sup>14</sup>

The *Wal-Mart* case represents the Supreme Court's recognition that the configuration of a product requires more stringent showings to obtain protection under the trademark laws than word or logo marks or packaging. In other words, the trademark laws are less likely to protect the way a product looks than the name or decoration on the product's trappings. The Court was quite clear that it would be more difficult to establish rights of an indefinite duration to a product, in and of itself, via the Lanham Act.<sup>15</sup>

Following *Wal-Mart*, the Supreme Court decided *TrafFix Devices, Inc. v.*

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4. 529 U.S. at 205.

5. *Id.*

6. 505 U.S. 763 (1992).

7. *Wal-Mart*, 529 U.S. at 210.

8. *Id.*

9. *Id.*

10. *Id.* at 211.

11. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 851 n.11 (1982).

12. *See Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995).

13. *Wal-Mart*, 529 U.S. at 212.

14. *Id.*

15. *Id.* at 212-13.



*Marketing Displays, Inc.*<sup>16</sup> The *TrafFix* case specifically considered the standards required for permissible protection under the Lanham Act for trade dress.<sup>17</sup> As in *Wal-Mart*, the Court limited such protection in the interest of, among other things, preserving legitimate competition.<sup>18</sup>

Marketing Displays, Inc. (MDI) had applied for and received patents (the “Sarkisian patents”) disclosing a mechanism using two springs for use with outdoor signs to maintain them upright in windy or other unfavorable conditions. MDI accused TrafFix’s signs of infringing trade dress rights MDI claimed in its own goods having the two-spring mechanism.<sup>19</sup> The Sarkisian patents had expired well before MDI’s assertion of trade dress rights against TrafFix. The Court identified the dual-spring design as “[t]he central advance claimed in the expired utility patents,” as well as “an essential feature of the trade dress MDI now seeks to protect.”<sup>20</sup> Although not apparently necessary to the holding in the case, the Court also noted, based on an analysis of a prior case for infringement of the Sarkisian patents brought by MDI against a third party, that the accused TrafFix goods would have infringed the Sarkisian patents.<sup>21</sup>

The Court’s analysis began with a recognition that the Lanham Act may afford protection to distinctive product packaging or design.<sup>22</sup> Such trade dress enjoys the same shelter from uses by others that tend to cause confusion as to origin, sponsorship or approval of the goods as trademarks used with such products.<sup>23</sup> The Lanham Act explicitly places the burden on the one claiming trade dress rights to prove the assertedly protected features non-functional.<sup>24</sup> Indeed, the Court’s *Wal-Mart* opinion (noted above) “caution[ed] against misuse or overextension of trade dress . . . [and stated] that ‘product design almost invariably serves purposes other than source identification.’”<sup>25</sup>

Perhaps most remarkable about the Court’s review of guiding principles of law is its strong statement of the place of copying in proper competitive behavior. “In general, unless an intellectual property right such as a patent or copyright protects an item, it will be subject to copying. As the Court has explained, copying is not always discouraged or disfavored by the laws which preserve our competitive economy.”<sup>26</sup> Moreover, the Lanham Act does not “reward manufacturers for their innovation in creating a particular device,” nor does it “protect trade dress in a functional design simply because an investment has been

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16. 532 U.S. 23 (2001).

17. *Id.* at 28-29 (citing 15 U.S.C. § 1125(a)(1)(A) (2003)).

18. *Id.* at 33-35.

19. *Id.* at 23.

20. *Id.* at 23-24.

21. *Id.* at 24 (citing *Sarkisian v. Winn-Proff Corp.*, 997 F.2d 1313 (9th Cir. 1983)).

22. *Id.* at 28-29.

23. *Id.*

24. *Id.* at 29 (citing 15 U.S.C. § 1125(a)(3) (2003)).

25. *Id.* (citing *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 213 (2000)).

26. *Id.* (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 160 (1989)).

made to encourage the public to associate" it with a given seller.<sup>27</sup> Thus, "[t]rade dress protection must subsist with the recognition" that copying is proper in appropriate circumstances.<sup>28</sup>

The Court also clarified the functionality standard to be used in trade dress cases. A feature, whether utilitarian or aesthetic, is functional "if it is essential to the use or purpose of the article or if it affects the cost or quality of the article."<sup>29</sup> Whether a non-reputation-related disadvantage would be present if trade dress is protectible is not an issue in a trade dress case, unless aesthetic functionality of a feature is claimed and the feature does not meet the *Inwood/Qualitex* test noted above.

Where a feature is functional, certain results obtain. First, it is not necessary to analyze whether a functional feature has achieved the level of "secondary meaning" or acquired distinctiveness mandated by *Wal-Mart*.<sup>30</sup> In other words, regardless of the type of feature, the length of time of its use, the amount or nature of advertising or recognition of the feature, or other factors going to its potential distinctiveness, if the feature is functional it gets no protection.

Second, there is no reason to consider other design possibilities or speculate as to whether the accused could have done something different with his or her product. Rather, "functionality of the . . . design means that competitors need not explore whether other [designs] might be used" with the product in question.<sup>31</sup> Further, the Court found it nonsensical to construe the trade dress law to require a competitor to hide or disguise a feature of a working product, particularly one that customers may demand.<sup>32</sup> Again, a competitor is allowed to use unpatented functional features without even considering questions of what else he could have done.

Focusing on the relevance of the expired Sarkisian patents to the functionality debate, the Court found them not merely relevant but of "vital significance in resolving a trade dress claim."<sup>33</sup> In fact, "a utility patent is strong evidence that the features therein claimed are functional,"<sup>34</sup> and a "heavy burden" is placed on one attempting to establish trade dress protection for features claimed in a patent.<sup>35</sup> It is noted that the Court discussed "claimed" features, and this may not have reached a case where the feature at issue was disclosed, but not claimed, in a patent.<sup>36</sup> However, such features are considered to be in the public domain and

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27. *Id.* at 34-35.

28. *Id.* at 23.

29. *Id.* at 32 (quoting *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165 (1995)); see also *Inwood Labs., Inc. v. Ives Labs., Inc.* 456 U.S. 844, 850 n.10 (1982).

30. *Id.* at 24 ("Functionality having been established, whether [MDI's dual-spring] design has acquired secondary meaning need not be considered.").

31. *Id.* at 33-34.

32. *Id.* at 34.

33. *Id.* at 23.

34. *Id.*

35. *Id.* at 30.

36. *Id.* at 23-24. In fact, the Court appeared to leave this question open, saying "In a case



thus unpatented and usable by all.<sup>37</sup> Further, the patent laws require that a patent include a complete written description of the best mode of the invention known at the time of filing, in such depth as to enable one of ordinary skill in that art to make and use the invention.<sup>38</sup> Features disclosed in the patent as part of the inventive device could thus be considered part of that “best mode” of the device and affect the quality of the device. In sum, while facts in each case will guide the determination, there are substantial arguments that features of a device disclosed but not claimed in a patent are also functional and copyable for purposes of the Lanham Act.

The Supreme Court specifically took issue with the opinion of the Sixth Circuit Court of Appeals that held that the design of the two-spring mechanism was not functional. The Sixth Circuit took the position that because it would require “‘little imagination to conceive of a hidden dual-spring mechanism or [another] mechanism that might avoid infringing’” the putative trade dress, then a competitor such as TrafFix would have to find a way “‘to set its sign apart.’”<sup>39</sup> The Court further noted the Sixth Circuit’s requirement of a “‘significant non-reputation-related disadvantage before trade dress protection is denied on functionality grounds.’”<sup>40</sup>

Notably, the Court expressly avoided the question of whether the Lanham Act’s protection for trade dress would be precluded by a patent concerning the article simply by operation of the Patent Clause of the Constitution.<sup>41</sup> It is unfortunate that the Court did not follow its emphatic pronouncement affirming limits on product configuration trade dress rights with an opinion on that question. Given the facts of the *TrafFix* case, with an expired utility patent devoted, at least openly—if not directly—to a feature in which trade dress rights were claimed, it seems that the Court missed an opportunity to remove further doubt as to the reach of trade dress law. Nevertheless, the Court identified the kind of case in which it would decide the issue,<sup>42</sup> and the tone of this opinion

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where a manufacturer seeks to protect arbitrary, incidental, or ornamental aspects of features of a product found in the patent claims, such as arbitrary curves in the legs or an ornamental pattern painted on the springs, a different result might obtain.” *Id.* at 34. Nevertheless, given the Court’s forceful tone concerning the limitations on the trade dress law elsewhere in the *TrafFix* opinion, it appears the Court may be receptive to such arguments.

37. See *Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1106-08 (Fed. Cir. 1996).

38. 35 U.S.C. § 112 (2004).

39. *TrafFix Devices, Inc.*, 532 U.S. at 27 (quoting *Mktg. Displays, Inc. v. TrafFix Devices, Inc.*, 200 F.3d 929, 940 (6th Cir. 1999)).

40. *Id.* at 27-28 (quoting *Mktg. Displays, Inc.*, 200 F.3d at 940).

41. U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”). Trademark and trade dress protection have indefinite durations, i.e., they are not necessarily for “limited times.”

42. *TrafFix Devices, Inc.*, 532 U.S. at 35 (“If, despite the rule that functional features may not be the subject of trade dress protection, a case arises in which trade dress becomes the practical equivalent of an expired utility patent, that will be time enough to consider the matter.”).

seems clearly to suggest the Court's direction and ultimate judgment.

### B. *Facts of Eco Case*

The United States District Court for the Southern District of Indiana used these principles in deciding *Eco Manufacturing L.L.C. v. Honeywell International, Inc.*<sup>43</sup> In that case, Honeywell International asserted that the round shape of a thermostat was protectible trade dress and that Eco Manufacturing had infringed that trade dress by marketing a similar round thermostat.<sup>44</sup> Honeywell's asserted rights included a registration for the round shape obtained from the United States Patent and Trademark Office (PTO).<sup>45</sup>

Honeywell obtained U.S. Patent No. 2,394,920 in 1946, which included a claim to a thermostat with a round shape. The *Eco* court noted that the prosecution history of that patent included Honeywell's arguments focusing on the shape of the thermostat and differentiating that shape from prior art references.<sup>46</sup> After submitting such arguments, the PTO issued the patent. Later, Honeywell applied for and received a design patent, No. D176,657, covering the ornamental design of a round thermostat.

After the utility patent had expired, and toward the end of the life of the design patent, Honeywell applied to the PTO to register the shape of the round thermostat as a trademark. The PTO rejected the application, claiming that it would improperly extend the patent-based monopoly on the design afforded by the design patent. At that time, the PTO noted the functionality issue, but decided not to address it. After an appeal that reversed the rejection, the PTO considered the issue of whether the round shape of the thermostat was functional, found that it was, and denied a registration for that reason. Some years later, Honeywell again tried to register the shape as a trademark; this time it succeeded.

### C. *Findings and Conclusions*

The issue facing the district court, simply put, was whether the Honeywell thermostat shape was functional and thus incapable of protection under the trademark laws. The court first reviewed the proceedings before the PTO's Examining Attorney and Trademark Trial and Appeal Board (TTAB), by which Honeywell received its registration. It found that those proceedings did not deserve deference for several reasons.<sup>47</sup> First, the court found it important that the PTO proceedings were *ex parte* rather than contested.<sup>48</sup> The court also noted that there was significant evidence either not presented to or not understood by the PTO concerning other designs similar to Honeywell's that were available at the

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43. 295 F. Supp. 2d 854 (S.D. Ind. 2003).

44. *Id.* at 856.

45. U.S. Trademark Registration No. 1,622,108.

46. *Eco Mfg. L.L.C.*, 295 F. Supp. 2d at 859-62.

47. *Id.* at 865.

48. *Id.*



time its registration application was pending.<sup>49</sup> Perhaps most important, however, was the recognition that the PTO used the wrong standard for functionality in its determination to grant Honeywell a registration.<sup>50</sup> Not only was it incorrect, but the test used by the PTO focused on the needs of competitors, a criterion specifically rejected by the Supreme Court's *TrafFix* case.<sup>51</sup>

Using the guidance of the *TrafFix* case, and beginning with the premise that "[t]he functionality doctrine has marked the critical boundary between patent law and trademark law" for more than sixty years,<sup>52</sup> the court turned its focus to the evidence of functionality presented in the case. Having already found that the Honeywell utility patent claimed the round thermostat, the court refused to recognize the trademark rights Honeywell claimed:

Where recognizing a trademark right in a product configuration would prevent the public from practicing a useful invention that was the subject of an expired utility patent, the trademark is not valid because what it protects is a functional design or feature of the product. The trademark claim must give way to the public's rights under the patent bargain with inventor: exclusive rights for a limited period of time, followed by a public right to practice the invention.<sup>53</sup>

This holding, while pertinent to the idea of trade dress functionality, relies more on the fundamentals and bases of the patent law, even back to the Constitutional language of providing benefit to inventors for "limited times."<sup>54</sup> Left out of the court's explicit language, but tacitly linking together the holding and the functionality standards reviewed by the court, is the idea that features claimed (and perhaps disclosed) in a patent are functional because they allow or enable the public to use the invention.

The court went on to address alternative bases for denying Honeywell protection for its alleged trade dress rights. The round thermostat, the court correctly found, would also fail the test of aesthetic functionality.<sup>55</sup> Analogizing to the *Qualitex* case which found that a color that served no purpose other than identification was protectible, the court decided that the round shape of the thermostat was appealing to users, and "therefore positively affects the 'quality' of the product, independent of any association between the shape and the source of the product."<sup>56</sup> Like a color, a shape can make the product attractive to

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49. *Id.* at 866-68.

50. *Id.* at 866.

51. *Id.* (citing *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 33 (2001)).

52. *Id.* at 868 (citing *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111 (1938)). The *Eco* court emphasized the holding in *Kellogg* and earlier cases that the expiration of a utility patent gives the public the right to practice the invention described therein. *Id.*

53. *Id.* at 870 (citing *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041, 2048 (2003)).

54. *Id.* at 876 (citing U.S. CONST. art. I, § 8, cl. 8).

55. *Id.* at 870-72.

56. *Id.*

customers. With such attractiveness, the shape serves a purpose (i.e., satisfying customer tastes) that is other than identifying the thermostat's source.<sup>57</sup> The trade dress laws cannot be used to prevent a competitor from making a product as visually appealing as the product at issue.<sup>58</sup>

The court also noted an issue of estoppel against Honeywell, based on its arguments to the PTO to get its utility patent claims allowed back in 1946.<sup>59</sup> Since Honeywell had taken the position that its round shape was a part of the patented invention so as to obtain allowance of its patent, it should not be permitted in this trade dress case to deny such functionality.<sup>60</sup>

Honeywell's charge that Eco tried to copy its round thermostat design was immaterial to the outcome. As the court noted, a defendant's intent to copy may be relevant in trademark issues, but "is not relevant if the design in question is functional."<sup>61</sup> Copying is not necessarily anathema to fair competition, and, as noted above, it is axiomatic that the public is entitled to copy devices disclosed and claimed in expired patents. Honeywell's claims that Eco could use another shape and that its investments and allegedly exclusive use prove "secondary meaning" are also irrelevant due to the round shape's functionality.<sup>62</sup> The court also found that the incontestibility of Honeywell's registration was not a factor, even under the "half-hearted" argument that invalidating Honeywell's rights amounted to an unconstitutional taking of property.<sup>63</sup>

#### D. Analysis

The *Eco* case, in this commentator's view, interprets properly the Supreme Court's *TrafFix* and related opinions, and with *TrafFix* provides a clear roadmap for several of the issues faced in litigating trade dress cases. A threshold issue in all such cases must be whether the asserted trade dress can support any rights under the Lanham Act. In cases where the alleged trade dress consists of the form or features of the given product itself, that threshold is rightly going to be relatively high. The proponent of protection must establish that its trade dress does not affect the cost or quality of the goods, even if that "quality" concerns the tastes of purchasers or other aesthetic properties. Where a trade dress configuration is functional, most other questions concerning protection under the Lanham Act fall out in the name of effective competition.

While both *Eco* and *TrafFix* focus on the functionality evidence provided by a utility patent, the cases also adequately indicate what kind of evidence and what kind of inquiry is relevant to functionality. The *Eco* opinion noted also the existence of a design patent, but did not discuss at great length what effect it had

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57. *Id.* at 871.

58. *Id.* (citing *Publ'ns Int'l, Ltd. v. Landoll, Inc.*, 164 F.3d 337, 339 (7th Cir. 1998)).

59. *Id.* at 872-73.

60. *Id.* at 873.

61. *Id.* at 874.

62. *Id.* at 875.

63. *Id.* at 876.



on the functionality debate. The design patent would be an independent basis for the court's position prohibiting trademark protection after expiration of a patent; the public should be no less entitled to use the subject matter of an expired design patent than it is entitled to use the subject matter of an expired utility patent. Further, that a design is the subject of a design patent would appear to indicate the value of that design, suggesting that the design would affect the quality or desirability of the article to which it is applied. It is noted that *TrafFix* appears to leave open the question of whether some appearance or ornamentation noted in a utility patent could still form the basis for trade dress protection. Nevertheless, there would seem to be little to differentiate the functionality analysis concerning a product configuration claimed in a design patent versus one claimed in a utility patent.

## II. PROPOSED REVISIONS TO THE INDIANA TRADEMARK ACT

In 2003, Senator Vi Simpson (D-Bloomington) offered Senate Bill 119,<sup>64</sup> which would replace the current Indiana Trademark Act<sup>65</sup> with provisions of the model state trademark act. At the time of going to press, no action beyond introduction had been taken on the bill. By its language, the bill would not be effective before July 1, 2004, but given the current status of the bill it does not appear that it could be enacted before that date.

In many respects, the bill appears to update or rearrange the language of the Act without providing significant substantive changes. For example, the current Act uses the phrase "applied to" to denote the association of a mark with its respective goods. Thus, the current Act makes unregistrable a mark that "when applied to the goods or services of the applicant," is merely descriptive, deceptively misdescriptive, or would be likely to cause confusion.<sup>66</sup> The proposed bill would change "applied to" to "used on or in connection with," language most Indiana practitioners will be familiar with from the provisions of the Lanham Act.<sup>67</sup> This commentator is not aware of any case law or other interpretation of the phrase "applied to" that would make it significantly different from the sense of "used on or in connection with" used by the U.S. Patent and Trademark Office (PTO) and federal courts. If there is any difference in the two phrases, the proposed new language would appear to be somewhat more broad, particularly if "applied to" requires a physical contact of a mark with the goods, as opposed to use "in connection with" goods, as on package inserts.

Perhaps the most notable change proposed by the bill, both from the perspective of practitioners and government officials, is proposed new section 4.5 (which would be codified as Indiana Code section 24-2-1-4.5), which provides that the Secretary of State or other designated person or agency "may examine the

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64. S.B. 119, 113 Gen. Assem., 2d Reg. Sess. (Ind. 2004), available at [www.in.gov/legislative/bills/2004/IN/IN0119.1.html](http://www.in.gov/legislative/bills/2004/IN/IN0119.1.html) (last visited Mar. 14, 2004).

65. IND. CODE § 24-2-1-1 (2004).

66. *Id.* § 24-2-1-3(e) to -3(f).

67. *See, e.g.*, 15 U.S.C. § 1051 (2004).

application [for trademark registration] for conformity with this chapter.”<sup>68</sup> The section includes provisions that would (1) require an applicant to provide any additional pertinent information, such as a description of a design mark; (2) permit rejections of applications and amendments thereto; (3) allow the Secretary to require disclaimer of an “unregisterable component” of a mark; and (4) identifying a priority system for applications based on order of filing.<sup>69</sup> Although obviously not as detailed as PTO procedures<sup>70</sup> detailed in Title 37, C.F.R., the outline of examination procedure found in this proposed new section appears to approximate the normal examination provided by the PTO.

The section concerning applications permits the secretary to require a drawing of the mark satisfying requirements to be specified, and a statement from the applicant indicating whether the mark is the subject of a federal registration application.<sup>71</sup> If a federal application has been filed, the applicant is to provide status information on the application that includes if the application has been finally refused or “otherwise not resulted in a registration” and the reasons for such refusal or nonregistration.<sup>72</sup> The option to require a drawing will not be unusual to practitioners familiar with federal trademark registration practice. The request for status information, however, is a significant change from standard PTO practice. As noted, the status information refers to reasons for a final refusal to register or other nonregistration, and thus would not appear to require constant updating of the progress of a related federal application. In this commentator’s view, this is a positive step toward promoting consistency in trademark determinations among jurisdictions. A final rejection issued by the PTO would be reported to the Indiana Secretary of State (“Secretary”), and barring some fact that would justify a state registration where a federal registration cannot be obtained, would provide the same basis for rejection of the state registration. Thus, the chance of inconsistent registration decisions being handed down by PTO and Indiana would be diminished.

Similarly, the Secretary would be empowered under proposed changes to section 10 (Indiana Code section 24-2-1-10) to cancel from the register, in addition to the marks identified in current subsections (2) to (4), any mark that has become the generic name for goods or services (or a part of them) for which the mark was registered, and any mark likely to cause confusion, deception or mistake with a mark federally registered by another before the filing date of the Indiana registration.<sup>73</sup> These new grounds for cancellation are not new ideas in trademark law. What is new is that the Secretary would apparently be allowed to consider and decide on the generic nature and likelihood of confusion issues. The current Act provides that the secretary is to cancel a registration when a court

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68. S.B. 119, 113th Gen. Assem., 2d Reg. Sess. § 4 (Ind. 2004).

69. *Id.*

70. See 37 C.F.R. § 2.1 (2002); Trademark Manual of Examining Procedure (TMEP) (3d ed. 2002).

71. *Id.* § 3.

72. *Id.*

73. *Id.* § 11.



of competent jurisdiction shall find that the “registration was granted improperly”<sup>74</sup> or “shall order cancellation of a registration on any ground.”<sup>75</sup> Thus, the place to challenge an Indiana registration under the current law is in court. Under the proposed change, however, it would appear that a new place to challenge registrations, at least in cases of alleged genericness or confusion with a federal registration, is in the Secretary’s office. Here, again, this section would appear to require the creation of procedures and capabilities for the Secretary or other designated agency to attend to such duties.

Section 6 of the Act (Indiana Code section 24-2-1-6) would be amended to reduce the term of the registration to five years from the present term of ten years.<sup>76</sup> From coinciding with the term of a federal registration, this change would make the term of an Indiana registration coincide with the terms provided in Illinois and other states. A renewal application “complying with the requirements of the secretary” must be filed within the six-month period prior to the end of the five-year term.<sup>77</sup> Changes to section 7 (Indiana Code section 24-2-1-7) would require such renewal applications to include a verified statement that the mark “has been and is still in use” as well as a specimen showing actual use of the mark.<sup>78</sup> That same section grandfathers prior registrations so that they continue in effect for their unexpired term.<sup>79</sup> Other than the somewhat awkward reference of both sections to renewal, their provisions appear quite straightforward.

One substantive change is proposed to section 8 (Indiana Code section 24-2-1-8), which concerns assignments of marks. A time period of three months is added for recordation of an assignment with the Secretary in order to accord it constructive notice of the transfer.<sup>80</sup> Thus, the amended provision would make an assignment void as against a subsequent purchaser for value without notice unless recorded in that three month period after the date of the assignment or prior to the subsequent purchase. Clearly, this amended provision places a burden of diligent recordal of an assignment on an assignee in order to perfect the transfer. Changes of name of a trademark registration owner may be filed under proposed new section 8.5 (which would be codified as Indiana Code section 24-2-1-8.5).<sup>81</sup> That same proposed new section would allow recordal, in the secretary’s discretion, of other instruments (originals or photocopies) affecting title or interests in a trademark, such as licenses, security interests and the like.<sup>82</sup> The bill’s new provision does not necessarily require a recording system specific to trademarks, and thus it could be possible to include trademarks in other property

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74. IND. CODE § 24-2-1-10(4)(C) (2004).

75. *Id.* § 24-2-1-10(5).

76. S.B. 119, 113th Gen. Assem., 2d Reg. Sess. § 6 (Ind. 2004).

77. *Id.*

78. *Id.* § 7.

79. *Id.*

80. *Id.* § 8.

81. *Id.* § 9.

82. *Id.*

filings with the Secretary. However, for Indiana businesses and trademark practitioners, a trademark-only filing system would seem to be preferable at least for ease of researching trademark title.

Turning to section 13 (Indiana Code section 24-2-1-13), changes to the infringement provision of the current Act appear to be relatively minor, but appearances could be deceiving. The first change of possible note is that use of a "reproduction, counterfeit, copy, or colorable imitation" of a registered mark in connection with distribution of goods or services is made actionable.<sup>83</sup> "Distribution" is a proposed addition to "sale, offering for sale, or advertising."<sup>84</sup> The addition may broaden the potential range of defendants. Further, an intent to cause deception, confusion or mistake, replaces knowledge of intent to cause such conditions in determining damages in certain cases. Whether either of these changes would constitute a significant alteration to the current law is unclear.

New causes of action are also provided by the bill. A new section 13.5 would be added that would provide a cause of action for trademark dilution.<sup>85</sup> The section would provide "an injunction and other relief" against dilution of a famous mark.<sup>86</sup> In determining whether a mark is famous, the court "may" consider a non-exclusive list of factors.<sup>87</sup> Several of the factors, including degree of distinctiveness, extent of publicity, and degree of recognition of the mark, are specifically tied to Indiana, making this dilution provision at least somewhat geography-specific.<sup>88</sup> Notwithstanding the provision permitting "other relief," subsection (b) specifically limits relief to injunctive relief unless it is proven that the defendant "willfully intended to trade on the owner's reputation or to cause dilution of the famous mark."<sup>89</sup> Not actionable under this section are (1) "[f]air use . . . in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark," (2) noncommercial uses, and (3) news reporting and news commentary.<sup>90</sup> It is noted that the "fair use" exception appears to be specifically tailored to fit narrow cases.

Other new causes of action, for cancellation of a registration and for mandamus to compel registration, are provided in proposed new section 14.5 (which would be codified as Indiana Code section 24-2-1-14.5).<sup>91</sup> The section identifies that such actions are available without providing substantive bases for proving such cases; presumably such substantive bases are those identified in prior sections of the Act. A mandamus action would be restricted to the record of the registration application that was before the Secretary, and thus would appear to be analogous to an appeal in federal registration practice, i.e., from an

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83. *Id.* § 14.

84. *Id.*

85. *Id.* § 15.

86. *Id.*

87. *Id.*

88. *See id.*

89. *Id.*

90. *Id.*

91. *Id.* § 17.



Examining Attorney to the TTAB, or from the TTAB to the Court of Appeals for the Federal Circuit. A cancellation action would not include the Secretary in the first instance, but the proposed section would allow the Secretary to intervene.<sup>92</sup>

Where damages are available, an addition to section 14 (Indiana Code section 24-2-1-14) would permit a court to assess treble damages and attorney's fees where a party "committed wrongful acts with knowledge, in bad faith, or otherwise as according to the circumstances of the case."<sup>93</sup> This section specifically deals with infringement suits. There would thus seem to be a strong argument that the treble damages and fees provision would be applicable only in such suits. There is no apparent provision in the proposed new act for such damages and fees for claims (e.g. cancellation claims) brought outside the context of an infringement suit.

Note the permissive language of several sections, and particularly the examination section, i.e. that the Secretary "may" examine applications.<sup>94</sup> Presumably, "may" is a purposeful addition that would either (1) give the Secretary the option not to examine some or all applications or (2) leave the decision as to whether to begin examining for later rule-making or legislation, or both. Previously, no such examination has been made in Indiana of registration applications. Thus, the Secretary or other designated agency or department will have to establish procedures, databases, systems, and other infrastructure to be able to conduct examinations. The permissive examination provision seems to allow some time to tackle issues relating to examination and to allow the secretary or other designated agency a significant amount of latitude in creating procedures and enforcing the proposed new provisions.

### III. CLAIM INTERPRETATION

In the realm of patent law, among the cases concerning interpretation of patent claims handed down by the United States Court of Appeals for the Federal Circuit was one particularly important, perhaps seminal, opinion. In *Texas Digital Systems, Inc. v. Telegenix, Inc.*<sup>95</sup> the Federal Circuit reaffirmed holdings from *Teleflex, Inc. v. Ficosa North America Corp.*<sup>96</sup> that the starting point for claim interpretation was the "ordinary meaning" of the claim terms,<sup>97</sup> and only a "manifest disavowal" of claim scope in the specification or prosecution history would limit such scope.<sup>98</sup> It also provided a clear roadmap for proper interpretation. That road-map appears to begin to reverse trends in other parts of the patent law that limit patent coverage.

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92. *Id.*

93. *Id.* § 16.

94. *Id.* § 4.

95. 308 F.3d 1193 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 2230 (2003).

96. 299 F.3d 1313 (Fed. Cir. 2002).

97. *Tex. Digital Sys.*, 308 F.3d at 1202 (citing *Teleflex, Inc.*, 299 F.3d at 1325).

98. *Id.* at 1204 (citing *Teleflex, Inc.*, 299 F.3d at 1324).

### A. Texas Digital

*Texas Digital* began its analysis of claim construction with the premise that "terms used in the claims bear a 'heavy presumption' that they mean what they say and have the ordinary meaning that would be attributed to those words by persons skilled in the relevant art."<sup>99</sup> The court then proceeded to go into how that "ordinary meaning" is determined. Previously dictionaries and other sources of word meaning were considered usable for claim interpretation, and "extrinsic evidence" was to be consulted only if the claims remained ambiguous after referring to the patent file.<sup>100</sup> Expert or other evidence relating to how one of ordinary skill in the art would interpret a term, even though plainly "extrinsic," was offered.<sup>101</sup>

*Texas Digital*, however, started from the premise that the source of "ordinary meaning" is the dictionary. It is hardly possible to overstate the value the court places on such resources:

Dictionaries, encyclopedias and treatises, publicly available at the time the patent is issued, are objective resources that serve as reliable sources of information on the established meanings that would have been attributed to the terms of the claims by those of skill in the art. *Such references are unbiased reflections of common understanding not influenced by expert testimony or events subsequent to the fixing of the intrinsic record by the grant of the patent, not colored by the motives of the parties, and not inspired by litigation. Indeed, these materials may be the most meaningful sources of information to aid judges in better understanding both the technology and the terminology used by those skilled in the art to describe the technology.*<sup>102</sup>

The court goes on to say effectively that it is improper to refer to those resources as "extrinsic evidence."<sup>103</sup> Thus, the starting point for claim interpretation, rather than reference to the patent specification or prosecution history, is now "ordinary meaning" provided by relevant dictionaries.<sup>104</sup>

Once appropriate dictionary definitions are found, the patent specification and file history are to be consulted to determine if any of those definitions are not consistent with the patentee's usage in those areas.<sup>105</sup> It is not necessary to choose only one definition; rather, where "more than one dictionary definition is consistent with the use of the words in the intrinsic record, the claim terms may be construed to encompass all such consistent meanings."<sup>106</sup> Further, the intrinsic

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99. *Id.* at 1202 (citations omitted).

100. *Id.* at 1202-03, 1212.

101. *Id.* at 1212.

102. *Id.* at 1202-03 (emphasis added).

103. *Id.* at 1203.

104. *Id.* at 1202.

105. *Id.* at 1204.

106. *Id.* at 1203.



record (specification and file history) should also be consulted to see if the “heavy presumption” in favor of the ordinary meaning of claim terms has been rebutted.<sup>107</sup> That presumption could potentially be overcome in a given case if the patentee specifically identified a particular definition for a term, or if he or she has “disavowed or disclaimed scope of coverage, by using words or expressions of manifest exclusion or restriction, representing a clear disavowal of claim scope.”<sup>108</sup>

If any doubt were left as to the order of steps in claim interpretation, the Federal Circuit answered them directly.

Consulting the written description and prosecution history as a threshold step in the claim construction process, before any effort is made to discern the ordinary and customary meanings attributed to the words themselves, invites a violation of our precedent counseling against importing limitations into the claims. . . . Indeed, one can easily be misled to believe that this is precisely what our precedent requires when it informs that disputed claim terms should be construed in light of the intrinsic record . . . . But if the meaning of the words themselves would not have been understood to persons of skill in the art to be limited only to the examples or embodiments described in the specification, reading the words in such a confined way would mandate the wrong result and would violate our proscription of not reading limitations from the specification into the claims. By examining relevant dictionaries, encyclopedias and treatises to ascertain possible meanings that would have been attributed to the words of the claims by those skilled in the art, and by further utilizing the intrinsic record to select from those possible meanings the one or ones most consistent with the use of the words by the inventor, the full breadth of the limitations intended by the inventor will be more accurately determined and the improper importation of unintended limitations from the written description into the claims will be more easily avoided.<sup>109</sup>

*Texas Digital* thus harmonizes the principles that (1) a patent claim should not necessarily be limited to the example(s) described and shown in the specification, and (2) claims are a part of the specification. Only where there are “manifest disavowals” of claim scope, whether in the claims, the specification or the file history, will the claims be so limited. Parties who start with the specification and get to dictionaries later, or not at all, will be more likely to miss a sound claim construction.

*Texas Digital*, as indicated above, is a significant change to the prior prevailing wisdom on claim interpretation. By starting with dictionary definitions because of their objectivity in the context of litigation, the opinion calls into substantial question the usefulness of expert testimony as to the meaning of claim

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107. *Id.* at 1202-03.

108. *Id.* at 1204.

109. *Id.* at 1204-05 (citations omitted).

terms. Indeed, since expert testimony is only admissible if helpful to the trier of fact,<sup>110</sup> *Texas Digital* forms the basis not only for development of evidence contrary to an expert opinion, but for a challenge to the admissibility of an opinion on claim meaning in the first place.

The opinion also specifically provides that claim terms can have several dictionary meanings so long as they are not contradicted by the specification or file history of the patent.<sup>111</sup> This is certainly consistent with the idea running through patent law, i.e. in the Doctrine of Equivalents, that language is many times inadequate to fully express the concepts to be protected by a patent. The metes and bounds of patent protection may suffer given such inadequacies. Giving a certain term used in the claim all of its various senses that are in harmony with the patent tends to compensate for language's shortcomings. Indeed, it would seem that unless a "manifest disavowal" is intended, claim language is to be interpreted somewhat more broadly than may have been the case before *Texas Digital*.

To summarize, the patent bar and interested Indiana practitioners and businesses may wish to reassess patent language under the *Texas Digital* principles to ensure the coverage of such language is accurately determined. Note that later cases, including *Kumar v. Ovonic Battery Co.*,<sup>112</sup> have already taken *Texas Digital*'s pronouncements to heart and expounded on them.

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110. FED. R. EVID. 702.

111. *Tex. Digital Sys., Inc.*, 308 F.3d at 1203.

112. 351 F.3d 1364 (Fed. Cir. 2003).



# SURVEY OF RECENT DEVELOPMENTS IN PRODUCT LIABILITY LAW

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## INTRODUCTION

The 2003 survey period<sup>1</sup> once again produced an interesting array of published product liability decisions. Those decisions demonstrate that Indiana judges and product liability practitioners are still refining the scope and meaning of the Indiana Product Liability Act ("IPLA").<sup>2</sup> They also demonstrate that the Indiana General Assembly may need to clarify some of its policy intentions in several areas.

This survey does not attempt to address in detail all cases applying Indiana product liability law decided during the survey period.<sup>3</sup> Rather, it examines selected cases that are representative of the important product liability issues. This survey also provides some background information, context, and commentary where appropriate.

## I. THE SCOPE OF THE IPLA

The Indiana General Assembly first enacted the IPLA in 1978. It originally governed claims in tort utilizing both negligence and strict liability theories. In 1983, the General Assembly amended it to apply only to strict liability actions.<sup>4</sup> In 1995, the General Assembly amended the IPLA to once again encompass tort theories of recovery based upon both strict liability and negligence theories.<sup>5</sup>

In 1998, the General Assembly repealed the entire IPLA and recodified it,

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1. The survey period is October 1, 2002 to September 30, 2003.

2. IND. CODE § 34-20-1-1 to -9-1 (1999). This survey Article follows the lead of the Indiana General Assembly and employs the term "product liability" (not "products liability") when referring to actions governed by the IPLA.

3. Judge Barker's decision in *In re Bridgestone/Firestone, Inc. (Estate of Zachary)*, 2002 U.S. Dist. LEXIS 24954 (S.D. Ind. 2002), is one example of a product liability decision that practitioners may find useful even though much of the opinion interprets Georgia law. The decision contains a discussion about exclusion of expert testimony in federal court that practitioners may find particularly useful.

4. 1983 Ind. Acts 1815.

5. 1995 Ind. Acts 4051; see *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 487 n.2 (Ind. 2001).

effective July 1, 1998.<sup>6</sup> The 1998 recodification did not make substantive revisions; it merely redesignated the statutory numbering system to make the IPLA consistent with the General Assembly's reconfiguration of the statutes governing civil practice.

The IPLA, Indiana Code sections 34-20-1-1 to -9-1, governs and controls all actions that are brought by a user or consumer against a manufacturer or seller for physical harm caused by a product, regardless of the theory of liability.<sup>7</sup> When Indiana Code sections 34-20-1-1 and -1-2 are read together, there are five unmistakable threshold requirements (regardless of theory) for liability under the IPLA: (1) a claimant whom is a user or consumer and is also in the class of persons that the seller should reasonably foresee as being subject to the harm caused; (2) a defendant that is a manufacturer or a seller engaged in the business of selling a product; (3) physical harm caused by a product; (4) a product that is in a defective condition unreasonably dangerous to a user or consumer or to his property; and (5) a product that reached the user or consumer without substantial alteration in its condition.<sup>8</sup>

In connection with the foregoing threshold issues, it is important to recognize that Indiana Code section 34-20-1-1 clearly states that the IPLA governs and controls all claims brought by users or consumers against manufacturers or sellers for physical harm arising out of the use of a defective and unreasonably dangerous product. Such is true "regardless of the theory of liability."<sup>9</sup>

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6. The current version of the IPLA is found at Indiana Code sections 34-20-1-1 to -9-1.

7. IND. CODE § 34-20-1-1.

8. *Id.* §§ 34-20-1-1 to -1-2. Indiana Code section 34-20-2-1 imposes liability only when a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property . . . if: (1) that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition; (2) the seller is engaged in the business of selling the product; and (3) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.

*Id.* § 34-20-2-1.

9. In the wake of the 1995 amendments to the IPLA, practitioners and sometimes judges have seemed to struggle with what the IPLA covers and what it does not. Indiana Code section 34-20-1-1 provides that the IPLA governs and controls all actions brought by users and consumers against manufacturers or sellers (under the right circumstances) for physical harm caused by a product *regardless of the theory of liability*. Accordingly, theories of liability based upon breach of warranty, breach of contract, and common law negligence against entities that are outside of the IPLA's statutory definitions are not governed by the IPLA. *E.g.*, *N.H. Ins. Co. v. Farmer Boy AG, Inc.*, 2000 U.S. Dist. LEXIS 19502, at \*9 (S.D. Ind. 2000) (alleging breach of implied warranty in tort is a theory of strict liability in tort and, therefore, has been superceded by the theory of strict liability; plaintiff could proceed on a warranty theory so long as it was limited to a contract theory). At the same time, however, Indiana Code section 34-20-1-2 provides that the "[IPLA] shall not be construed to limit any other action from being brought against a seller of a product." IND. CODE



*A. User or Consumer*

The language the General Assembly employs in the IPLA is very important when it comes to who qualifies as IPLA claimants. Indiana Code section 34-20-1-1 provides that the IPLA governs claims asserted by “users” and “consumers.” For purposes of application of the IPLA, “consumer” means:

- (1) a purchaser; (2) any individual who uses or consumes the product;
- (3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or (4)
- any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.<sup>10</sup>

“User” has the same meaning as “consumer.”<sup>11</sup>

A literal reading of the IPLA seems to demonstrate that even if a claimant falls within one of those statutorily-defined groups, he or she also must satisfy

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§ 34-20-1-2. That language, when compared with the “regardless of the legal theory upon which the action is brought” language found in Indiana Code section 34-20-1-1 raises an interesting question: whether alternative claims against product sellers or suppliers that fall outside the reach of the IPLA are still viable when the “physical harm” suffered is the very type of harm the IPLA otherwise would cover. See Joseph R. Alberts & James M. Boyers, *Survey of Recent Developments in Product Liability Law*, 36 IND. LAW REV. 1165, 1177-78 (2003); see also text accompanying *infra* notes 96-97.

In three recent cases, *Ritchie v. Glidden Co.*, 242 F.3d 713 (7th Cir. 2001), *Kennedy v. Guess, Inc.*, 765 N.E.2d 213 (Ind. Ct. App. 2002), and *Goines v. Federal Express Corp.*, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. 2002) (applying Indiana law), courts subjected “sellers” to potential liability based on common law negligence theories for the very same “physical harm” covered by the IPLA. In doing so, those and other courts seem to assume that common law “negligence” claims based upon design and warning theories still exist separate and apart from the IPLA, citing to cases that were decided before the 1995 amendments to the IPLA and at a time when Indiana still recognized dual-track strict liability and negligence claims. The 1995 amendments impose negligence standards for design and warning claims and retain strict liability only for manufacturing claims.

Whether courts have the power to impose common law negligence liability against “sellers” when the harm allegedly suffered is the same “physical harm” covered by the IPLA is an open question. If a “seller” cannot be held liable for “physical harm” that is clearly within the purview of IPLA (e.g., a manufacturing defect theory when the seller has no actual knowledge of the defect and cannot otherwise be deemed a manufacturer pursuant to Indiana Code section 34-20-2-4 or Indiana Code section 34-6-2-77), how can the same entity be liable for the same “physical harm” outside the purview of the IPLA? That idea seems to run contrary to the Indiana General Assembly’s policy determination that the IPLA covers all actions for “physical harm” “regardless of the theory of liability.” The Indiana General Assembly may need to address whether and to what extent a common law negligence claim for the same “physical harm” covered by the IPLA is an “other action” that the IPLA does not limit.

10. IND. CODE § 34-6-2-29.

11. *Id.* § 34-6-2-147.

another statutorily-defined threshold before proceeding with a claim under the IPLA. That additional threshold is found in Indiana Code section 34-20-2-1(1), which requires that the "user" or "consumer" also be "in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition."<sup>12</sup> The IPLA does not appear to provide a remedy to any claimant whom a seller should reasonably foresee as being subject to the harm caused by a product's defective condition. Rather, it would appear as though the claimant first has to fit within the IPLA's definition of "user" or "consumer." If the claimant falls outside of the IPLA's definition of "user/consumer," whether that claimant was "reasonably foreseeable" as being subject to harm caused by a product's defect may be irrelevant.

Indiana courts have issued several published decisions in recent years that construe the statutory definition of "user" and "consumer."<sup>13</sup> The latest, *Vaughn v. Daniels Co.*,<sup>14</sup> is a case in which Solar Sources, Inc. ("Solar") contracted Daniels Company ("Daniels") to design, procure and construct a coal preparation plant. Daniels contracted Trimble Engineers and Constructors, Inc. ("Trimble") to construct the plant, including the assembly of three coal sumps according to Daniels' blueprints and specifications. Trimble employed Vaughn, who was injured while installing one of the coal sumps into the coal preparation plant. In an effort to assist his coworkers, Vaughn climbed onto the sump without securing his safety belt while a pipe was maneuvered through the wall of the plant by a forklift and raised to the level of the sump. Once the pipe was raised, Trimble employees wrapped a chain around the pipe to support it as the forklift pulled away. The chain gave way, the pipe slipped, and Vaughn fell fifteen feet, suffering significant injuries. Vaughn sued Solar and Daniels. His theories of liability against Daniels included product liability, negligence and nuisance.<sup>15</sup> His theories of liability against Solar were negligence and nuisance.<sup>16</sup>

The trial court granted Daniels' motion for summary judgment, concluding as a matter of law that Vaughn was not a foreseeable "user or consumer" as contemplated by the IPLA.<sup>17</sup> Vaughn appealed. Daniels argued that because the

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12. *Id.* § 34-20-2-1; see also *supra* note 8.

13. See *Butler v. City of Peru*, 733 N.E.2d 912 (Ind. 2000) (holding maintenance worker could be considered a "user or consumer" of electrical transmission system because his employer was the ultimate user and he was an employee of the "consuming entity"); *Estate of Shebel v. Yaskawa Elec. Am., Inc.*, 713 N.E.2d 275 (Ind. 1999) (holding "user or consumer" includes a distributor who uses the product extensively for demonstration purposes).

14. 777 N.E.2d 1110 (Ind. Ct. App. 2002), *clarified on rehearing*, 782 N.E.2d 1062 (2003). In his dissenting opinion, Chief Judge Brook concluded that Vaughn could not maintain an action against Solar or Daniels under the IPLA. Vaughn, however, did not make a claim against Solar under the IPLA. Accordingly, the clarification on rehearing recognized: "Given that Vaughn did not maintain an action against Solar under the [IPLA], any mention in Chief Judge Brook's dissent of Solar's liability under the act should be disregarded." *Vaughn*, 782 N.E.2d at 1062-63.

15. *Vaughn*, 777 N.E.2d at 1110.

16. *Id.*

17. *Id.*



sump was not designed to be a “construction scaffold,” Vaughn was not a foreseeable user or consumer of it. Daniels also argued that Vaughn could not maintain a claim under the IPLA because the sump had not been injected into the stream of commerce and that Vaughn was not a member of the consuming public.

In a 2-1 decision, a majority of the court of appeals held that Vaughn was a “user” of the construction scaffold as that term is statutorily defined.<sup>18</sup> The fact the sump was not being used for its primary intended purpose was irrelevant to the majority because “the installation would be encompassed under the umbrella of reasonably expected uses.”<sup>19</sup>

In reaching its decision, the *Vaughn* majority first distinguished two cases upon which the trial court relied, *Thiele v. Faygo Beverage, Inc.*<sup>20</sup> and *Lukowski v. Vecta Educational Corp.*<sup>21</sup> The majority first refused to apply *Thiele*, which held that a stock clerk who was injured by an exploding soda bottle was not a “user” or a “consumer.” The *Vaughn* majority distinguished *Thiele* on its facts because Thiele worked for a passing intermediary whereas Vaughn worked for the initial consuming entity.<sup>22</sup> The *Vaughn* majority also believed it important that the sump was at its final destination being installed for use and, therefore, not a “transient product” such as a case of soft drinks.<sup>23</sup>

The second case, *Lukowski v. Vecta Educational Corp.*,<sup>24</sup> involved a plaintiff who fell from the top of the balcony bleachers in a high school gymnasium. The school had elected to use the bleachers in a partially finished condition before the railings had been delivered. The *Vaughn* majority summarized the *Lukowski* court’s holding by recognizing that an unfinished product does not meet the “delivery” prerequisite for the imposition of liability under the IPLA.<sup>25</sup> The

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18. *Id.* at 1128.

19. *Id.* at 1127-28.

20. 489 N.E.2d 562 (Ind. Ct. App. 1986).

21. 401 N.E.2d 781 (Ind. Ct. App. 1980). The *Vaughn* majority also discussed two other cases, *Crist v. K-mart*, 653 N.E.2d 140 (Ind. Ct. App. 1995) and *Wingett v. Teledyne Industries*, 479 N.E.2d 51 (Ind. 1985). The majority opinion includes a discussion about *Crist* ostensibly as a way to point out what the majority termed a “logical inconsistency” in *Thiele* and to note that Daniels, unlike the defendant in *Crist*, could be liable because it was not an “occasional seller who is not engaged in that activity as part of [its] business.” *Vaughn*, 777 N.E.2d at 1125 (quoting *Crist*, 653 N.E.2d at 143). *Wingett* is another case the trial court cited. The *Vaughn* majority’s discussion about *Wingett* is limited, merely pointing out that the Indiana Supreme Court, while holding that a manufacturer’s potential liability for products placed in the stream of commerce does not extend to the demolition of the product, reasoned that it was “necessary to look at the intended use of a product in analyzing the issue of foreseeable use in determining whether a plaintiff is a user or consumer.” *Id.* at 1125-26 (citing *Wingett*, 479 N.E.2d at 56).

22. 777 N.E.2d at 1124. Thiele was a “middle man” employee who merely handled Faygo’s product as it flowed in the stream of commerce toward a retail purchaser. *Thiele*, 489 N.E.2d at 585-88.

23. 777 N.E.2d at 1124-25.

24. 401 N.E.2d at 781.

25. 777 N.E.2d at 1124-25 (citing *Lukowski*, 401 N.E.2d at 786).

*Vaughn* majority then determined that the two cases are different because the school in *Lukowski* opted to use the bleachers before the railing had been shipped and installed, whereas the sump was not designed with a railing.<sup>26</sup> The *Vaughn* majority buttressed its conclusion that the cases are legally distinguishable by pointing out that the injury in *Lukowski* was not foreseeable to the manufacturer because it was "not expected that the school would use the bleachers for members of the public in a partially completed state."<sup>27</sup> According to the *Vaughn* majority, however, Vaughn's injury during installation was "foreseeable and expected" by Daniels<sup>28</sup> and Vaughn "was not injured as a result of someone using the sump in an incomplete state in an unforeseeable manner."<sup>29</sup>

After distinguishing *Thiele* and *Lukowski*, the *Vaughn* majority found instructive the case of *Stegemoller v. ACandS, Inc.*,<sup>30</sup> using its rationale as the foundation for the opinion. *Stegemoller* and its two companion matters, *Martin v. ACandS, Inc.*<sup>31</sup> and *Camplin v. ACandS, Inc.*,<sup>32</sup> are cases in which the Indiana Supreme Court held that the wives of insulators who were exposed to asbestos fiber by washing their husbands' work clothes qualified as "users" of the asbestos-containing products at issue because of their status as "bystanders" pursuant to what is now Indiana Code section 34-6-2-29(4).<sup>33</sup> That section provides the final of four alternative definitions for the term "user/consumer" for purposes of the IPLA, defining "user/consumer" to include "any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use."<sup>34</sup> The *Stegemoller* court determined that the reasonably expected use of asbestos-containing products included customary clean-up activities such as cleaning asbestos residue from one's person and clothing at the end of the workday.<sup>35</sup> According to the *Vaughn*

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26. *Id.* at 1125.

27. *Id.*

28. *Id.* The *Vaughn* majority concluded that the injury was foreseeable and expected by Daniels because Daniels hired Trimble to install the sump according to its plans in order for the machine to become operational. *Id.*

29. *Id.*

30. 767 N.E.2d 974 (Ind. 2002).

31. 768 N.E.2d 426 (Ind. 2002).

32. 768 N.E.2d 428 (Ind. 2002).

33. In *Stegemoller*, *Martin*, and *Camplin*, the wives claimed that asbestos dust remained on their husbands' work clothes, and that they inhaled the dust brought home from the various workplaces while laundering those work clothes. The wives claimed various illnesses, all allegedly caused by inhalation of asbestos fibers. The trial court dismissed the wives' claims, finding that they were not "users" or "consumers" as defined by the IPLA because they were not in the vicinity of the product during its reasonably expected use (as industrial insulation) and, accordingly, could not be considered "bystanders." *Id.* Thus, the trial court held that the wives could not sustain causes of action under the IPLA or at common law. *Id.* The Indiana Court of Appeals affirmed. *Id.* The Indiana Supreme Court reversed. *Id.*

34. IND. CODE § 34-6-2-29(4) (1999).

35. 767 N.E.2d at 976. The *Stegemoller* court was influenced heavily by what it viewed as



majority:

[I]t is self-evident that if, for example, maintenance is a reasonably expected “use” of a product, the person performing the maintenance is a “user” of the product. Thus, the supreme court’s analysis as to who falls within the definition of “user and consumer,” even as a bystander, is instructive to our analysis today.<sup>36</sup>

The *Vaughn* majority further wrote:

By approving maintenance and ‘customary clean-up activities’ as reasonably expected uses for purposes of determining who is a user or consumer, including bystander, the [*Stegemoller*] court expanded the application of the [IPLA] to activities beyond the exact intended purpose of the product. The [*Stegemoller*] court included not only the intended use of the product, but also those activities related to furthering the use of the product.<sup>37</sup>

Accordingly, the *Vaughn* majority concluded that it is a “logical extension of the [*Stegemoller*] analysis to include in the definition of user or consumer a person who is injured while installing a product. The installation of a product is the preparation of a product for safe operation, just as maintenance is in many cases.”<sup>38</sup>

That the sump was not yet being used for its primary intended purpose (processing slurry) was, according to the *Vaughn* majority, not fatal to the claim because the installation “would be encompassed under the umbrella of

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a point implicit in *Butler v. City of Peru*, 733 N.E.2d 912 (Ind. 2000). The *Butler* court held that a maintenance worker who was electrocuted while trying to restore power to an electrical outlet was a user or consumer under the IPLA. The *Stegemoller* court wrote: “Implicit in th[e *Butler*] holding was the assumption that maintenance may be part of a product’s reasonably expected use.” 767 N.E.2d at 976. The *Stegemoller* court further reasoned that the “normal, expected use of asbestos products entails contact with its migrating and potentially harmful residue” and concluded that “divorcing the underlying product from fibers or other residue it may discharge is not consistent with the [IPLA].” *Id.*

The opinions in *Stegemoller*, *Camplin*, and *Martin* either broaden the term “vicinity” or they broaden the term “reasonably expectable use,” or perhaps they do both. On the one hand, it is hard to argue that the wives in these three cases were anywhere close to the “vicinity” of the products in their intended use as industrial insulation at the commercial jobsites where their husbands worked. On the other hand, it is admittedly difficult to argue with the court’s logic that the “reasonably expectable” use of asbestos insulation necessarily entails contact with migrating fibers and that it does not make sense to divorce those fibers from the insulation end product. In light of *Stegemoller*, *Camplin*, and *Martin* it is difficult to ascertain with any certainty just how broadly courts will (or should) view the “vicinity” of the “reasonably expectable use.”

36. 777 N.E.2d at 1127.

37. *Id.*

38. *Id.*

reasonably expected uses.”<sup>39</sup> Indeed, the *Vaughn* majority wrote that it was foreseeable to Daniels that installation would be required and that the sump could not become operational for its intended purpose without being installed. In that sense, the court reasoned, it is a “different kind of product than many other consumer products affected by the [IPLA].”<sup>40</sup> The majority’s final reasoning is as follows:

The installation process was not only foreseeable but expected and routine, just as the cleaning process in *Stegemoller* and the maintenance was in *Butler*. If Vaughn was, in fact, injured by Daniels’ defective product, it seems illogical that he would be precluded from pursuing a suit against Daniels simply because the sump was not completely installed when he was injured while trying to install it, particularly when the alleged defect affected his ability to install it safely.<sup>41</sup>

The *Vaughn* majority’s “logical extension” of *Stegemoller* is noteworthy for at least a couple of reasons. First, the majority utilized a “reasonably foreseeable” analysis from a case that interpreted “bystanders” under Indiana Code section 34-6-2-29(4) and applied it in the context of the “user/consumer” definition found in Indiana Code section 34-6-2-29(2). Second, the majority’s “reasonably foreseeable” analysis applied in arriving at the “user/consumer” determination may be at odds with a literal reading of the IPLA.

With respect to the first point, the *Vaughn* majority unmistakably utilized the *Stegemoller* analysis, having initially recognized that Vaughn could not be a “user” or “consumer” under the “bystander” definition found in Indiana Code section 34-6-2-29(4).<sup>42</sup> Because Vaughn was neither a “purchaser” (Indiana Code section 34-6-2-29(1)) nor a “person who, while acting for or on behalf of the injured party, was in possession and control of the product in question” (Indiana Code section 34-6-2-29(3)), the claim could not proceed under the IPLA unless the Vaughn was a person, who “used” or “consumed” the product pursuant to Indiana Code § 34-6-2-29(2). Applying the *Stegemoller* rationale, the *Vaughn* majority concluded that installers such as Vaughn should fall within the statutory definition of “user/consumer.”<sup>43</sup>

In its initial introduction of the *Stegemoller* case, the *Vaughn* majority characterizes *Stegemoller* as a case that considered the “notion of reasonably foreseeable use.”<sup>44</sup> Whether the issue of legal foreseeability was truly before the *Stegemoller* court is open to interpretation because the standard by which bystanders are determined to be “users/consumers” is one that examines whether the claimant is a person “who would reasonably be expected to be in the vicinity

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39. *Id.*

40. *Id.*

41. *Id.* at 1127-28.

42. *Id.*

43. *Id.*

44. *Id.* at 1126.



of the product during its reasonably expected use.”<sup>45</sup> It is not unfair to say that whether a use is factually or legally “foreseeable” by a manufacturer is not necessarily synonymous with the use the manufacturer expects or intends. Regardless, there are two fundamental precepts upon which the *Vaughn* majority rests that are largely driven by public policy: (1) that the General Assembly intended the term “reasonably expected use” to, as *Stegemoller* determined, include maintenance and clean-up activities so as to confer “user/consumer” status on bystanders; and (2) that the General Assembly intended that the installation of a product itself, without more, should confer “user/consumer” status upon the individual performing the installation.

The first precept, embraced by the Indiana Supreme Court, holds that the General Assembly intended the IPLA to allow recovery by bystander “users” for injuries sustained during maintenance or “clean-up” attendant to a product’s “reasonably expected use” pursuant to Indiana Code section 34-6-2-29(4). Although many industrial and commercial products require some amount of maintenance attendant to their reasonably expectable use, the IPLA contains no clear policy statement about whether it was intended to cover injuries sustained during “maintenance” or “clean-up” attendant to reasonably expected use for purposes of Indiana Code section 34-6-2-29(4).

The *Vaughn* majority’s second precept holds that the General Assembly intended the IPLA to provide recovery for injuries sustained during all activities, including installation, that relate in any way to furthering the product’s use. Chief Judge Brook took issue with that in his dissent:

While I agree that current precedent supports the conclusion that maintenance of a product may be part of that product’s “reasonably expected use” under certain limited circumstances, it simply does not follow that *installation* of the product itself, without more, confers “user” status on the individual performing the installation.

The verb “use” may be defined as “[t]o employ or make use of (an article, etc.) esp[ecially] for a profitable end or purpose[.]” The verb “install” may be defined as “[t]o place (an apparatus, a system of ventilation, lighting, heating, or the like) in position for service or use[.]” Quite simply, installation of a product occurs *before use of the product has even begun* and therefore cannot be part of a product’s use. Consequently, one who installs a product cannot be a user under the [IPLA].<sup>46</sup>

It is also interesting that the *Vaughn* majority relied so heavily upon a foreseeability analysis in supporting its legal determination that installation of a product, which is admittedly not part of its “primary intended purpose,” is nevertheless “encompassed under the umbrella of reasonably expected uses.”<sup>47</sup>

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45. IND. CODE § 34-6-2-29(4) (1999).

46. 777 N.E.2d at 1140 (Brook, C.J., dissenting) (footnote and citations omitted).

47. *Id.* at 1127. The *Vaughn* majority reached its conclusion despite the fact that the sump, by the majority’s own admission, was not being used at the time the injury was sustained for its



Reliance upon such an analysis in arriving at the “user/consumer” determination may be at odds with a literal reading of the IPLA. As briefly discussed above, the IPLA seems to separate the “reasonably foreseeable plaintiff” analysis from the analysis required to determine who qualifies as a “user/consumer.” Indiana Code section 34-20-2-1(1) states that “users” and/or “consumers” must also be “in the class of persons that the seller should reasonably foresee as being subject to harm caused by the defective condition.”<sup>48</sup> Thus, the plain language of the statute seems to assume that a person or entity is already defined as a “user” or a “consumer” *before* the separate “foreseeability” analysis is to be undertaken. In that regard, the IPLA may not automatically provide a remedy to any claimant whom a seller should reasonably foresee as being subject to the harm caused by a product’s defective condition.

With that statutory framework in mind, recall that the *Stegemoller* opinion was limited to a determination about whether a claimant qualified as a “user/consumer” by virtue of “bystander” status conferred by Indiana Code section 34-6-2-29(4). Recall also that a bystander “user” is one “who is in the vicinity of the product during its reasonably expected use.” The General Assembly’s inclusion of the term “reasonably expected” when modifying the word “use” for purposes of who qualifies as bystander “users” certainly seems to entail something akin to a foreseeability analysis. Thus, the *Stegemoller* court’s use of a foreseeability analysis similar to what was performed earlier in cases such as *Lukowski* or *Wingett* does not seem inconsistent with the IPLA in the limited context of interpreting the scope of bystander “users” pursuant Indiana Code section 34-6-2-29(4). The definition of “user” for purposes of Indiana Code section 34-6-2-29(2), however, contains no such “reasonably expected” component or requirement. It states merely that a “user” is “any individual who uses or consumes the product.” Nothing modifies the term “uses.” If the IPLA does indeed contemplate a foreseeability analysis only after the statutory definition of “user/consumer” has been satisfied, then any such analysis in arriving at the “user/consumer” definition for purposes of Indiana Code section 34-6-2-29(2) may be at odds with the intended post-1995 statutory framework.<sup>49</sup>

The statutory interpretations offered by the Indiana Supreme Court in *Stegemoller* and the Indiana Court of Appeals in *Vaughn* involve fundamental

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intended purpose (processing slurry). *Id.*

48. Indiana Code section 34-20-2-1 imposes liability only when a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user’s or consumer’s property . . . if . . . that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition. . . .

IND. CODE § 34-20-2-1 (1999).

49. In this regard, it is important to note that all of the cases distinguished or rejected by the *Vaughn* majority were decided several years before the General Assembly revised and enacted the current IPLA in 1995.



choices about the intended breadth of the IPLA. This is an area with respect to which the General Assembly may choose to offer additional guidance.

### *B. Manufacturer or Seller*

For purposes of application of the IPLA, “manufacturer” means “a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer.”<sup>50</sup> For purposes of application of the IPLA, “seller” means “a person engaged in the business of selling or leasing a product for resale, use, or consumption.”<sup>51</sup> Indiana Code section 34-20-2-1(2) of the IPLA employs nearly identical language when addressing the threshold requirement that liability under the IPLA will not attach unless the “seller” is “engaged in the business of selling the product.”<sup>52</sup>

Sellers also can be manufacturers. The definition of “manufacturer” expressly includes a seller who

(1) has actual knowledge of a defect in a product; (2) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process; (3) alters or modifies the product in any significant manner after the product comes into the seller’s possession and before it is sold to the ultimate user or consumer; (4) is owned in whole or significant part by the manufacturer; or (5) owns in whole or significant part the actual manufacturer.<sup>53</sup>

A seller also may be held liable to the same extent as a manufacturer in one other limited circumstance, namely if the court is “unable to hold jurisdiction over a particular manufacturer” and if the seller is the manufacturer’s principal distributor or seller.<sup>54</sup>

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50. IND. CODE § 34-6-2-77.

51. *Id.* § 34-6-2-136.

52. *Id.* § 34-20-2-1(2); *see, e.g.*, *Williams v. REP Corp.*, 302 F.3d 660 (7th Cir. 2002) (recognizing that Indiana Code section 34-20-2-1 imposes a threshold requirement that an entity must have sold, leased, or otherwise placed a defective and unreasonably dangerous product into the stream of commerce before IPLA liability can attach and before that entity can be considered a “manufacturer” or “seller”); *Del Signore v. Asphalt Drum Mixers*, 182 F. Supp. 2d 730 (N.D. Ind. 2002) (reasoning that although it provided some technical guidance or advice relative to ponds at an asphalt plant, such activity was not sufficient to constitute substantial participation in the integration of the plant with the pond so as to deem defendant a “manufacturer” of the plant).

53. IND. CODE § 34-6-2-77(a).

54. *Id.* § 34-20-2-4; *see, e.g.*, *Goines v. Fed. Express Corp.*, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. 2002) (applying Indiana law). The court examined the “unable to hold jurisdiction over” requirement of Indiana Code section 34-20-2-4. The plaintiff assumed that “jurisdiction” refers to the power of the court to hear a particular case. The defendant argued that the phrase equates to

There is one other important provision about which practitioners must be aware when it comes to liability of “sellers” under the IPLA. When the theory of liability is based on “strict liability in tort,”<sup>55</sup> Indiana Code section 34-20-2-3 provides that an entity that is merely a “seller” and cannot be deemed a “manufacturer” is not liable and is not a proper IPLA defendant.<sup>56</sup>

There are no published decisions during the 2003 survey period that address in detail manufacturers or sellers under the IPLA.

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“personal jurisdiction.” The court refused to resolve the issue, deciding instead simply to deny the motion for summary judgment because the designated evidence did not clearly establish entitlement to application of Indiana Code section 34-20-2-4. *Id.* Kennedy v. Guess, Inc., 765 N.E.2d 213, 217-18 (Ind. Ct. App. 2002) (defendants failed to designate sufficient evidence demonstrating foreign manufacturer and distributor were not the “principal distributor or seller” of an allegedly defective umbrella, and absent evidence to show definitive identity of principal distributor, court refused to apply Indiana Code section 34-20-2-4 to bar liability).

55. The phrase “strict liability in tort,” to the extent that the phrase is intended to mean “liability without regard to reasonable care,” appears to encompass only claims that attempt to prove that a product is defective and unreasonably dangerous by utilizing a manufacturing defect theory. Indiana Code section 34-20-2-2 provides that cases utilizing a design defect or a failure to warn theory are judged by a negligence standard, not a “strict liability” standard. IND. CODE § 34-20-2-2.

56. In *Ritchie v. Glidden Co.*, 242 F.3d 713, 725 (7th Cir. 2001), the court cites what is now Indiana Code section 34-20-2-3 for the proposition that sellers in a product liability action may not be liable unless the seller can be deemed a manufacturer. Applying that reading of what is now Indiana Code section 34-20-2-3, the court held that defendant Glidden could not be liable pursuant to the IPLA because the plaintiff failed to designate sufficient facts to demonstrate that Glidden had actual knowledge of an alleged product defect (lack of warning labels) and because Glidden did not meet any of the other statutory definitions or circumstances under which it could be deemed a manufacturer. *Id.* There is an omission in the *Ritchie* court’s citation to what is now Indiana Code section 34-20-2-3 that may be quite significant. The statutory provision quoted in *Ritchie* leaves out the following important highlighted language: “[A] product liability action *based on the doctrine of strict liability in tort* may not be commenced or maintained. . . .” *Id.* (emphasis added). The *Ritchie* case involved a failure to warn claim against Glidden under the IPLA. Indiana Code section 34-20-2-2 provides that “strict liability in tort” applies now only to IPLA cases in which the theory supporting why the product was defective and unreasonably dangerous is a manufacturing defect. Indiana Code section 34-20-2-2 unequivocally provides that liability regardless of the exercise of reasonable care simply does not apply to warning or design claims, which are controlled by a negligence standard. Thus, if indeed the phrase “strict liability” means “liability without regard to the exercise of reasonable care,” then the only theory to which such a standard applies is a manufacturing defect theory. *E.g.*, Burt v. Makita USA, Inc., 212 F. Supp. 2d 893 (N.D. Ind. 2002). Accordingly, the *Ritchie* court, in a negligent failure to warn case, seems to be applying a provision of the IPLA that was only intended, as written, to be applied to sellers in manufacturing defect cases. Courts appear to have done the same thing in *Kennedy*, 765 N.E.2d at 217-18, *Goines*, 2002 U.S. Dist. LEXIS 5070 (applying Indiana law), and *Williams*, 302 F.3d at 660.



### *C. Physical Harm Caused by a Product*

For purposes of application of the IPLA, “physical harm” means “bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.”<sup>57</sup> It does not include “gradually evolving damage to property or economic losses from such damage.”<sup>58</sup>

For purposes of application of the IPLA, “product” means “any item or good that is personalty at the time it is conveyed by the seller to another party.”<sup>59</sup> “The term does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.”<sup>60</sup>

There are no published decisions during the 2003 survey period that address either the “physical harm” or “product” requirements.

### *D. Defective and Unreasonably Dangerous*

Succinctly stated and as noted above, the IPLA imposes liability in favor of statutorily-delineated users and consumers against statutorily-delineated

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57. IND. CODE § 34-6-2-105.

58. *Id.*; *see, e.g.*, *Miceli v. Ansell, Inc.*, 23 F. Supp. 2d 929 (N.D. Ind. 1998) (in a case brought by a couple against a condom manufacturer, court denied a motion to dismiss, determining that Indiana recognizes that pregnancy may be considered a “harm” in certain circumstances); *Fleetwood Enter., Inc. v. Progressive N. Ins. Co.*, 749 N.E.2d 492 (Ind. 2001) (holding personal injury and property damage to other property from a defective product are actionable under the IPLA, but their presence does not create a claim for damage to the product itself); *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484 (Ind. 2001) (holding no recovery under IPLA where claim is based on damage to the defective product itself); *see also* *Great N. Ins. Co. v. Buddy Gregg Motor Homes, Inc.*, 2002 U.S. Dist. LEXIS 7830 (S.D. Ind. 2002) (no recovery under IPLA in case involving motor home destroyed in a fire allegedly caused by a defective wire in the engine compartment).

59. IND. CODE § 34-6-2-114.

60. *Id.*; *e.g.*, *N.H. Ins. Co. v. Farmer Boy AG, Inc.*, 2000 U.S. Dist. LEXIS 19502 (S.D. Ind. 2000) (J. Tinder) (installation of a custom-fit electrical system into a hog barn involved wholly or predominately the sale of a service rather than a product); *R.R. Donnelley & Sons Co. v. N. Tex. Steel Co.*, 752 N.E.2d 112 (Ind. Ct. App. 2001) (manufacturer of component parts of a steel rack system sold a product and did not merely provide services because it modified raw steel to produce the component parts and, in doing so, transformed the raw steel into a new product that was substantially different from the raw material used); *Marsh v. Dixon*, 707 N.E.2d 998 (Ind. Ct. App. 1999) (an amusement ride involved the provision of a service and not the sale of a product); *Lenhardt Tool & Die Co. v. Lumpke*, 703 N.E.2d 1079 (Ind. Ct. App. 1999) (defendant provided products and not merely services because it transformed metal block into “new” products and because it repaired damaged products, both of which created “new,” substantially different work product); *see also* *Great N. Ins. Co.*, 2002 U.S. Dist. LEXIS at 7830 (involving a fire that destroyed a motor home, plaintiff insurance carrier attempted to state a claim for negligent inspection against defendant separate and apart from IPLA and court rejected the negligence claim, determining that no reasonable juror could determine that the allegedly negligent inspection occurred as part of a transaction for “services” separate and apart from the purchase of the motor home).

manufacturers and sellers of defective and unreasonably dangerous products that are expected to and do, in fact, reach users or consumers without substantial alteration in their condition.<sup>61</sup> The "rule of liability" in Indiana Code section 34-20-2-1 provides that such is true even though: "(1) the seller has exercised all reasonable care in the manufacture and preparation of the product; and (2) the user or consumer has not bought the product from or entered into any contractual relation with the seller."<sup>62</sup> What Indiana Code section 34-20-2-1 bestows, however, in terms of liability despite the exercise of "all reasonable care," (i.e., fault) Indiana Code section 34-20-2-2 largely removes. Chapter 2-2 first eliminates the privity requirement between buyer and seller for imposition of liability, but it also confirms that a manufacturer's or seller's exercise of reasonable care eliminates liability in cases in which the theory of liability is design defect or warning defect:

[I]n an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.<sup>63</sup>

Indiana courts and commentators routinely have recognized that the post-1995 IPLA imposes a negligence standard in design and warnings cases, while retaining strict liability (liability despite the "exercise of all reasonable care") for manufacturing defect cases.<sup>64</sup> Thus, just as in any other negligence case, a claimant in a design or warnings case must prove: (a) duty; (b) breach of duty; and (c) injury caused by the breach.<sup>65</sup> Even though Indiana is years removed from the 1995 amendments to the IPLA, some courts and practitioners continue to use language that implies that "strict liability" and/or "liability without regard to reasonable care" still applies to cases in which the theory of liability is based upon inadequate warnings or improper design.<sup>66</sup>

In Chapter 4 of the IPLA, the focus returns to the IPLA's threshold requirement that only products that are in a "defective condition" are products

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61. IND. CODE § 34-20-2-1.

62. *Id.* § 34-20-2-2.

63. *Id.*

64. See *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); Timothy C. Caress, *Recent Developments in the Indiana Law of Products Liability*, 29 IND. L. REV. 979, 999 (1996) ("The effect of [Indiana Code section 34-20-2-3 and Indiana Code § 34-20-2-4] is to prevent the user or consumer injured by a product with a manufacturing defect from suing the local retail seller of the product on a strict liability theory unless, for some reason, the court cannot get jurisdiction over the manufacturer.").

65. See *Kennedy v. Guess, Inc.*, 765 N.E.2d 213, 220 (Ind. Ct. App. 2002).

66. See *Smock Materials Handling Co. v. Kerr*, 719 N.E.2d 396 (Ind. Ct. App. 1999) (court found no error in the trial court's use of the term "strict liability" in its instructions to the jury in a case that was not limited to manufacturing defects).



for which liability may attach pursuant to the IPLA. For purposes of the IPLA,

a product is in a defective condition if at the time it is conveyed by the seller to another party, it is in a condition: (1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling and consumption.<sup>67</sup>

As noted above, claimants in Indiana prove that a product is in a “defective condition” by asserting one or a combination of three theories: (1) the product has a defect that is the result of a malfunction or impurity in the manufacturing process; (2) the product has a defect in its design; or (3) the product lacks adequate or appropriate warnings.

There is a specific statutory provision covering the warning defect theory; it states that,

[a] product is defective . . . if the seller fails to: (1) properly package or label the product to give reasonable warnings of danger about the product; or (2) give reasonably complete instructions on proper use of the product; when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.<sup>68</sup>

The IPLA also provides two specific provisions concerning when a product is not defective. Indiana Code section 34-20-4-3 provides that “[a] product is not defective under [the IPLA] if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under [the IPLA].”<sup>69</sup> Indiana Code section 34-20-4-4 provides that “[a] product is not defective under [the IPLA] if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.”<sup>70</sup> Those two statutes are consistent with the two requirements for liability set forth in Indiana Code section 34-20-4-1.

The statutes that comprise Chapter 4 confirm that the IPLA requires that the product at issue be both in a condition not contemplated by expected users or consumers and unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways. Indiana Code sections 34-20-4-3 and 34-20-4-4 solidify that, as do recent cases.<sup>71</sup> A product is “unreasonably dangerous” if

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67. IND. CODE § 34-20-4-1.

68. *Id.* § 34-20-4-2.

69. *Id.* § 34-20-4-3.

70. *Id.* § 34-20-4-4.

71. See *Moss v. Crosman Corp.*, 136 F.3d 1169, 1174 (7th Cir. 1998) (stating that a product may be “dangerous” in the colloquial sense, but not “unreasonably dangerous” for purposes of IPLA liability); *In re Inlow, Accident Litigation*, 2002 U.S. Dist. LEXIS 8318, at \*66; CCH Prod. Liab. Rep. P16,346 (S.D. Ind. 2002) (“Although closely related to the question of whether a

its use exposes the user or consumer to a risk of physical harm beyond that contemplated by the ordinary user or consumer who purchases it with ordinary knowledge about the product common to consumers in the community.<sup>72</sup> A product is not unreasonably dangerous if it injures in a way or in a fashion that, by objective measure, is known to the community of persons consuming the product.<sup>73</sup>

1. *Warning Defect Theory*.—The duty to warn in Indiana consists of two duties: (1) to provide adequate instructions for safe use, and (2) to provide a warning about dangers inherent in improper use.<sup>74</sup> Indiana courts have been active in recent years in resolving cases involving warning defect theories.<sup>75</sup>

In *Birch v. Midwest Garage Door Systems*,<sup>76</sup> a young girl “sustained serious injuries when the door of the garage closed down on her while she was lying in its path.”<sup>77</sup> The Birches purchased the home from J. Robinson Homes (“Robinson”), a general contractor that builds and sells homes.<sup>78</sup> On April 3, 1993, at Robinson’s request, Midwest Garage Door Systems (“Midwest”) installed an automatic garage door opener system in the home that Robinson was constructing for the Birches.<sup>79</sup>

Most garage door systems have two types of safety mechanisms: (1) an “impact/rebound” type that prevents injury by triggering the door to stop closing when the lower edge of the door makes contact with any object; and (2) an

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product is defective because a failure to warn, a plaintiff must show that the product was unreasonably dangerous as a separate element of a product liability claim.”).

72. See IND. CODE § 34-6-2-146.

73. See *In re Inlow*, 2002 U.S. Dist. LEXIS 8318, at \*66 (citing *Anderson v. P.A. Radocy & Sons, Inc.*, 865 F. Supp. 522, 531 (N.D. Ind. 1994)).

74. See *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 161 (Ind. Ct. App. 1997).

75. See *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002) (rejecting the argument that a saw should have had warning labels making it more difficult for the saw guard to be left in a position where it appeared to be installed when in fact it was not; the scope of the duty to warn is determined by the foreseeable users of the product and there was no evidence that the circumstances of plaintiff’s injuries were foreseeable such that defendants had a duty to warn against those circumstances); *In re Inlow*, U.S. Dist. LEXIS 8318 (holding manufacturer and distributor did not have a duty to warn helicopter operators or passengers exiting or boarding helicopter about known, open and obvious dangers that were posed by moving and decelerating rotor blades); *McClain v. Chem-Lube Corp.*, 759 N.E.2d 1096 (Ind. Ct. App. 2001) (reasoning because designated evidence showed that both defendants knew that the product at issue was to be used in conjunction with high temperatures that occurred as a result of the hot welding process, trial court should have addressed whether the risks associated with use of product were unknown or unforeseeable and whether or not the defendants had a duty to warn of the dangers inherent in the use of the product); see also *Morgen v. Ford Motor Co.*, 762 N.E.2d 137 (Ind. Ct. App. 2002) (accrual before 1995 amendments to IPLA).

76. 790 N.E.2d 504 (Ind. Ct. App. 2003).

77. *Id.* at 508.

78. *Id.* at 507.

79. *Id.*



“optical sensor” type that prevents injury by not allowing the door to close if an electric beam, located across the bottom of the door opening, is interrupted by any object.<sup>80</sup>

On January 1, 1993, before Midwest installed an “impact/rebound” system at the Birch residence, the Consumer Product Safety Commission issued a Federal Residential Garage Door Safety Requirement (“Federal Safety Requirement”) that required garage door opener manufacturers to incorporate “optical sensors” as a standard safety feature.<sup>81</sup> Although the Federal Safety Requirement was effective January 1, 1993, manufacturers were permitted to continue selling door closing systems without optical sensors if they were built before January 1, 1993 so long as those systems complied with an applicable federal safety entrapment standard.<sup>82</sup> Although Midwest advised Robinson about the Federal Safety Requirement and the practical considerations related to selecting the garage door system, the Birches had no part in selecting the “impact/rebound” system used.<sup>83</sup> The Birches received a manual with the impact/rebound system, which strongly recommended an optical sensor system for families with small children.<sup>84</sup> Although the Birches became aware of the availability of optical sensors as an alternative to impact/rebound safety systems, they never installed an optical sensor system.<sup>85</sup>

The Birches sued Robinson, Midwest, Chamberlin Group (manufacturer of the garage door opener) and Windsor Door (manufacturer of a spring on the garage door).<sup>86</sup> Robinson and Midwest were the only active parties to the appeal, and Midwest was the only party alleged to be liable under the IPLA.<sup>87</sup> The Birches’ theory against Midwest alleged it was liable as a manufacturer because it was aware of the defective condition of the door.<sup>88</sup> The Birches argued that their garage door system was defective because of its design and because Midwest failed to warn them about the new Federal Safety Requirement.<sup>89</sup> Midwest filed a motion for summary judgment in the trial court, arguing that the garage door was not defective and that, in any event, it was not the manufacturer.<sup>90</sup> The trial court granted summary judgment for Midwest and the Birches appealed.<sup>91</sup>

Plaintiffs argued that Midwest was liable under Indiana Code section 34-20-

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80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 507-08.

84. *Id.* at 508.

85. *Id.*

86. *Id.* at 508 n.2.

87. *Id.* at 508-16.

88. *Id.* at 508-09.

89. *Id.* at 517.

90. *Id.* at 516.

91. *Id.*

2-1 as a seller of a product in a defective condition.<sup>92</sup> The Birches argued that their garage door system without optical sensors was in a defective condition unreasonably dangerous to the Birches within the confines of the IPLA.<sup>93</sup> The Birches alleged that their system was in a dangerous condition because it lacked an optical sensor and because the impact/rebound system may not work as intended if it is not properly maintained.<sup>94</sup> Indeed, the operating manual for the impact/rebound system at issue warned that maintenance needed to be performed monthly, and the record disclosed that the Birches only tested the system once during a four year period.<sup>95</sup>

Plaintiffs also contended that the impact/rebound system at issue was defective because the federal government "banned" systems without optical sensors.<sup>96</sup> Plaintiffs argued that because Midwest knew of the Federal Safety Requirement regarding optical sensors, Midwest should bear liability as a manufacturer because that term included "a seller who 'has actual knowledge of a defect in a product.'"<sup>97</sup> The court concluded that the garage door system at issue was not defective and that a change in a safety regulation, in and of itself, did not make a product defective.<sup>98</sup> Furthermore, the court found it important that the Federal Safety Requirement permitted the continued sale of systems without optical sensors.<sup>99</sup>

Next, the court turned its attention to the Birches' failure to warn theory that the "garage door opener was defective because Midwest failed to warn them 'that their garage door opener was no longer legal to manufacture for safety reasons.'"<sup>100</sup> Focusing on the designated evidence that illustrated the Birches' knowledge of the alleged defect, the court concluded that Midwest had no duty to warn plaintiffs about changes in federal safety regulations because the system manual they received included numerous warnings regarding impact/rebound systems and that "there was no information about garage door openers that could have been provided by Midwest that would have added to the Birches' understanding of the characteristics of the product."<sup>101</sup>

The Seventh Circuit also issued a published opinion in an allegedly inadequate warnings case. In *Ziliak v. AstraZeneca*,<sup>102</sup> plaintiff's physician prescribed an inhaled corticosteroid called Pulmicort Turbuhaler ("Pulmicort") to treat the plaintiff's asthma. Pulmicort, manufactured by defendant AstraZeneca, contained package inserts warning that "rare instances of glaucoma,

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92. *Id.* at 516-17.

93. *Id.* at 517-18.

94. *Id.* at 518.

95. *Id.*

96. *Id.*

97. *Id.* at 517 n.7 (quoting IND. CODE § 34-6-2-77(a) (1999)).

98. *Id.* at 518.

99. *Id.*

100. *Id.* (quoting Appellant Br.).

101. *Id.* at 518-19.

102. 324 F.3d 518 (7th Cir. 2003).



increased intraocular pressure, and cataracts have been reported following the inhaled administration of corticosteroids.”<sup>103</sup> Approximately ten months after plaintiff began taking Pulmicort, she developed severe glaucoma, cataracts, and high intraocular pressure.<sup>104</sup> Plaintiff sued AstraZeneca, claiming that “lack of adequate warnings rendered Pulmicort a defective or unreasonably dangerous product.”<sup>105</sup> The district court granted summary judgment to AstraZeneca, finding that it could not be held liable for plaintiff’s injuries under Indiana’s “learned intermediary” doctrine and because the warning accompanying Pulmicort was adequate as a matter of law.<sup>106</sup> Plaintiff appealed.

Because it agreed that the warning was adequate as a matter of law, the Seventh Circuit did not address the learned intermediary basis for the district court’s decision.<sup>107</sup> The *Ziliak* court recognized that in Indiana, “some products such as pharmaceuticals are unavoidably unsafe in that they are incapable of being made completely safe for their intended or ordinary use.”<sup>108</sup> The court also pointed out that “[s]uch a product, properly prepared, and accompanied by proper directions and warnings, is not defective, nor is it unreasonably dangerous.”<sup>109</sup> Indeed, according to the *Ziliak* court:

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103. *Id.* at 519. Plaintiff’s physician was aware of the warnings and of the risks of using Pulmicort to treat asthma. He prescribed Pulmicort because, in his view, the benefits of using the drug outweighed the risks. *Id.*

104. *Id.*

105. *Id.* Plaintiff originally filed her action in state court. AstraZeneca removed the case to federal district court based upon diversity of citizenship. *Id.*

106. *Id.* In response to AstraZeneca’s motion for summary judgment, plaintiff tendered an affidavit from her purported medical expert. Plaintiff’s expert opined that case reports and two small studies convinced him that the risk of glaucoma and cataracts, though small, should not have been characterized in the warning as “rare.” *Id.* He also concluded that the information given to the physician about the side effects of glaucoma and cataracts was insufficient to warn him adequately of the risk of those side effects. *Id.* at 520. He further concluded that

the information provided to the prescribing physician needs to state that there is a causal relationship between the use of Pulmicort and development of cataracts and glaucoma, that monitoring is necessary for development of these problems, and that cessation of inhaled steroid use needs to be considered, as part of any therapeutic regimen.

*Id.* (quoting Dr. Donald Marks, medical expert witness). The district court found that the expert’s testimony “was inadequate because he had not sufficiently established his expertise.” *Id.* Rather than rejecting the testimony outright, however, the district court gave plaintiff thirty days to submit additional affidavits establishing his qualifications. *Id.* The affidavits were not timely submitted. *Id.* Without the expert’s testimony, plaintiff had failed to identify any evidence suggesting that the warnings were inadequate. *Id.* Even if the affidavit had been timely filed, the district court held that the warning accompanying Pulmicort was consistent with what the warning should have said. *Id.*

107. *Id.* at 520-21.

108. *Id.* at 521 (citing *Moss v. Crosman Corp.*, 136 F.2d 1169, 1171 (7th Cir. 1998)).

109. *Id.* (quoting *Ortho Pharm. Corp. v. Chapman*, 388 N.E.2d 541, 545-46 (Ind. Ct. App. 1979)).

The duty to provide adequate warnings arises only when the manufacturer knows or should know of a risk posed by the product, and, in cases involving drugs available only by prescription, extends only to the medical profession, not the consumer. . . . A warning is adequate if it is reasonable under the circumstances.<sup>110</sup>

With respect to the particular Pulmicort warning at issue, the court failed to discern any inconsistency between how plaintiff contended AstraZeneca's package insert should have read and how it actually read:

If a pharmaceutical manufacturer warns doctors that specific adverse side effects are associated with the use of a drug . . . and development of potential side effects is implicit in the warning, as is the doctor's need to monitor the patient and to consider alternative therapies. Here Ziliak does not dispute that [her physician] was aware of AstraZeneca's warnings, and that he took the risks that Ziliak would develop adverse side effects into account when prescribing Pulmicort. Ziliak therefore has not identified any evidence demonstrating the existence of a triable question of fact whether the warnings accompanying Pulmicort were inadequate.<sup>111</sup>

Practitioners should be aware that the *Ziliak* opinion includes an assumption about the applicability of strict liability that, although not ultimately relevant to the court's decision, is contrary to the IPLA. In its review of Indiana law, the court writes that, "manufacturers are *strictly liable* to consumers for injuries caused by defective or unreasonably dangerous products placed in the stream of commerce."<sup>112</sup> A few sentences later, the court again incorporates strict liability into its analysis: "AstraZeneca is absolved of *strict liability* so long as it has imparted adequate warnings to treating physicians."<sup>113</sup> In support of its assumption about strict liability, the *Ziliak* court cites Indiana Code section 34-20-2-1.<sup>114</sup>

Because Ziliak's cause of action accrued in November 1998, there is no question that the case is governed by the current version of the IPLA, which was enacted in 1995. Although, as the *Ziliak* court recognized, it is true that the "rule of liability" established by Indiana Code section 34-20-2-1 applies even though a seller has exercised all reasonable care in the manufacture and preparation of the product (the rule of strict liability), Indiana Code section 34-20-2-2 eliminates the rule of liability without regard to reasonable care in all cases in which the theory of liability is inadequate warnings or improper design stating:

[I]n an action based on an alleged design defect in the product or based

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110. *Id.*

111. *Id.*

112. *Id.* (emphasis added).

113. *Id.* (emphasis added).

114. *Id.* (citing IND. CODE § 34-20-2-1 (1999)).



on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.<sup>115</sup>

Many courts have recognized that the post-1995 IPLA imposes a negligence standard in design and warnings cases, while retaining strict liability (liability despite the “exercise of all reasonable care”) for manufacturing defect cases.<sup>116</sup> *Ziliak*, however, does not stand alone among the recent opinions that rely upon outdated authority to support the proposition that strict liability still applies in cases in which the theory espoused to prove that a product is “unreasonably dangerous” or “defective” is based upon improper design or inadequate warnings.<sup>117</sup>

2. *Design Defect Theory*.—Indiana courts have required plaintiffs in design cases to prove what practitioners and judges often refer to as a “feasible alternative” design. Plaintiffs must demonstrate that another design not only could have prevented the injury but that the alternative design was effective, safer, more practicable, and more cost-effective than the one at issue.<sup>118</sup> Judge Easterbrook has described that a design claim in Indiana is a “negligence claim, subject to the understanding that negligence means failure to take precautions that are less expensive than the net costs of the accident.”<sup>119</sup>

In *Miller ex rel. Miller v. Honeywell International, Inc.*,<sup>120</sup> plaintiffs were victims of a helicopter crash involving an Army UH-1 “Huey” helicopter near Camp Atterbury in 1997.<sup>121</sup> They alleged that defective planetary gear within the helicopter’s engine fractured, causing the crash.<sup>122</sup> They further argued that

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115. IND. CODE § 34-20-2-2.

116. See, e.g., *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); *Kennedy v. Guess, Inc.*, 765 N.E.2d 213, 220 (Ind. Ct. App. 2002).

117. See *Smock Materials Handling Co. v. Kerr*, 719 N.E.2d 396 (Ind. Ct. App. 1999) (finding no error in the trial court’s use of the term “strict liability” in its instructions to the jury in a case that was not limited to manufacturing defects).

118. *Burt*, 212 F. Supp. 2d at 893; *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995). In addition to the failure to warn theory in *Burt*, the *Whitted* case also involved a design defect theory. The plaintiff in *Burt* was injured when a blade guard on a circular table saw struck him in the eye after one of his co-workers left the guard in what appeared to be the installed position. With respect to his design claims, plaintiff’s expert suggested that the saw could be designed so that the guard could be attached without tools or that the tools could be physically attached to the saw. *Burt*, 212 F. Supp. 2d at 900. The court rejected the claim, holding that the “plaintiff has wholly failed to show a feasible alternative design that would have reduced the risk of injury.” *Id.*

119. *McMahon v. Bun-O-Matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998).

120. 2002 U.S. Dist. LEXIS 20478 (S.D. Ind. 2002).

121. *Id.* at \*4-5.

122. *Id.* at \*53.

defendant Honeywell International, Inc. ("Honeywell") was responsible for the negligent design specifications for a "carrier assembly" that contained the gears and that Honeywell owed them a post-sale duty to warn about an alleged unreasonably dangerous alignment "defect" within the "carrier assembly."<sup>123</sup>

Although Honeywell did not manufacture the planetary gears, plaintiffs nevertheless argued that Honeywell was subject to liability as a manufacturer because the actual manufacturer of the planetary gears, Precision Gear ("Precision"), manufactured the planetary gears in accordance with Honeywell's drawings, design specifications and quality standards ("design specifications").<sup>124</sup> Because Precision manufactured the planetary gears sometime before 1977,<sup>125</sup> the court previously held that "any action for defects in the helicopter engine or the carrier assembly that existed at the time of sale was barred" by the statute of repose.<sup>126</sup> Claims based upon the defective planetary gears, however, survived the statute of repose because the carrier assembly at issue was overhauled in 1996, and the overhaul included new planetary gears.<sup>127</sup>

Honeywell conveyed the design specifications to the Army in 1989. Accordingly, the critical date that plaintiffs needed to use to establish Honeywell's liability was 1989, the date when the design specifications were placed "into the stream of commerce."<sup>128</sup> The court concluded that Honeywell was indeed a "manufacturer" under the IPLA because it defines "the term 'manufacturer,' in relevant part, as an 'entity who designs, assembles, fabricates . . . or otherwise prepares a product or a component of the product before the sale of the product to a user or consumer.'"<sup>129</sup>

The court properly identified the standard for liability in design defect cases as a negligence standard.<sup>130</sup> At a minimum, the court required that plaintiffs establish that Honeywell's design specifications were flawed and unreasonably dangerous in 1989.<sup>131</sup> The crux of plaintiffs' design defect claim charged that Honeywell's design specifications were defective and unreasonably dangerous because they allowed an inadequate carburization process.<sup>132</sup> More specifically, plaintiffs argued that Honeywell's heat treatment specifications did not conform to the state-of-the-art in 1989 because another design not only could have prevented the injury but that the alternative design was effective, safer, more practicable, and more cost-effective than the one at issue.<sup>133</sup> The court concluded that plaintiffs' offensive use of a state-of-the-art argument failed because: (1)

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123. *Id.* at \*2-3.

124. *Id.* at \*7-8.

125. *Id.* at \*6.

126. *Id.* at \*11-13.

127. *Id.* at \*7, \*13-16.

128. *Id.* at \*62-63.

129. *Id.* at \*36 (quoting IND. CODE § 34-6-2-77 (2002)).

130. *Id.* at \*38.

131. *Id.* at \*65.

132. *Id.*

133. *Id.* at \*66.



plaintiffs' own expert testified that Honeywell's heat treatment specifications were not unreasonably dangerous; and (2) although plaintiffs' expert repeatedly testified about superior specifications that should have been used by Honeywell, the record revealed that those specifications were not created until 1991.<sup>134</sup> Thus, the court held that "[Honeywell's] design specifications were not 'defective,' in the sense required by [the IPLA] at the time those specifications were introduced into the stream of commerce."<sup>135</sup>

*Vaughn v. Daniels Co.*,<sup>136</sup> discussed above in connection with the "user/consumer" issue, is a case in which defendant Daniels Company ("Daniels") designed a coal preparation plant. A contractor constructed the plant, including the assembly of three coal sumps according to Daniels' blueprints and specifications.<sup>137</sup> Plaintiff Vaughn, an employee of the contractor, was injured while installing one of the coal sumps into the coal preparation plant.<sup>138</sup> Vaughn climbed onto the sump without fastening his safety belt because he was rushing to assist coworkers who were maneuvering a pipe through the wall of the plant by a forklift and raising it to the level of the sump.<sup>139</sup> Once the pipe was raised, workers wrapped a chain around the pipe to support it as the forklift pulled away.<sup>140</sup> The chain gave way, the pipe slipped, and Vaughn fell.<sup>141</sup>

One of Daniels' arguments was that the sump was not "unreasonably dangerous" or "defective" because it was not meant to serve as a construction platform nor was Vaughn using the product for its intended purpose (to process slurry).<sup>142</sup> Two professional engineers submitted affidavits in favor of Daniels, both opining that the sump from which Vaughn fell was not unreasonably dangerous when used for its intended purpose.<sup>143</sup> Both engineers opined that the sump was typical of sump designs in coal preparation plants being constructed throughout the country at the time of Vaughn's fall.<sup>144</sup> Vaughn's expert affidavit responded that design flaws rendered the sump unreasonably dangerous because it did not have a handrail around the top and because it did not have some sort of

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134. *Id.* at \*64-65.

135. *Id.* at \*71. Plaintiffs' also asserted a related failure to warn claim, contending that Honeywell failed to warn the Army when it discovered that its heat treatment specifications, which were a subpart of the design specifications, were inadequate. *Id.* The court relied upon its previous analysis regarding plaintiffs' design defect claim, ultimately concluding that no duty to warn existed because the plaintiffs failed to first establish that the design specifications were defective in 1989, when they were sold to the Army. *Id.* at \*74.

136. 777 N.E.2d 1110 (Ind. Ct. App. 2002), *clarified on rehearing* 782 N.E.2d 1062 (2003).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 1128-29.

143. *Id.*

144. *Id.* at 1129.

apparatus above from which the pipe could easily be safely hoisted.<sup>145</sup>

After agreeing that the legal conclusions in Vaughn's expert's affidavit should be stricken, the *Vaughn* court reviewed remaining designated evidence and held as follows:

[I]t is clear that we have two experts maintaining one position, namely that the product was not being used for its intended purpose and is not dangerous when used for the proper purpose. We also have one expert taking the opposite stance, namely that there were design flaws in the sump that rendered it out of compliance with accepted safety standards. This contradiction is the classic question-of-fact scenario contemplated by Trial Rule 56, which necessarily precludes summary judgment on this issue.<sup>146</sup>

The *Vaughn* court reserved the "reasonably expected use" question for the jury with respect to whether the sump was "defective" and "unreasonably dangerous," yet none of the judges on the panel seemed to have any qualms about making a nearly identical inquiry into "reasonably expected use" in the context of deciding as a matter of law whether Vaughn was a "user" of the sump.<sup>147</sup> The apparent justification for the difference in treatment is the presence of dueling opinion affidavits.<sup>148</sup>

It is interesting, however, to point out that at least one recent court

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145. *Id.*

146. *Id.*

147. *Id.* at 1127-29.

148. *Id.* at 1128-29. In addition, Daniels argued that Vaughn misused the sump because he was using it at a construction platform and that it was not being used, nor could it have been used at the time of the accident, for its intended purpose. *Id.* at 1129. The court of appeals concluded that the issue of unforeseeable misuse was one to be left the jury. *Id.* at 1130.

Practitioners should note the relationship between the "misuse" defense set forth in Indiana Code section 34-20-6-4 and the language found in two other places within the IPLA, Indiana Code § 34-20-4-1(1) and Indiana Code § 34-20-4-3.

It is a defense to an action under [the IPLA] that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party. IND. CODE § 34-20-6-4 (1999). Indeed, the facts necessary to prove the defense of "misuse" at times may be similar or identical to the facts necessary to prove either that the product is in a condition not contemplated by reasonable users or consumers, *id.* § 34-20-4-1(1), or that the injury resulted from handling, preparation for use, or consumption that is not reasonably expectable, *id.* § 34-20-4-3, or both. Thus, in Indiana, there are at least three separate statutory standards that might bar liability when injury results from a set of circumstances related to uses that are beyond reasonable contemplation or expectation. *See, e.g., Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899-903 (N.D. Ind. 2002) (holding defendants were not liable because the manner in which the injury occurred was not reasonably foreseeable as a matter of law; that being the case, the statutory definition in Indiana Code section 34-20-4-1(1) had not been met and the defense of "misuse" in Indiana Code section 34-20-6-4 had been established).



interpreting Indiana law decided the “defective” and “unreasonably dangerous” issue as a matter of law in a design defect context even in the presence of divergent expert testimony. In *Burt v. Makita USA, Inc.*,<sup>149</sup> the plaintiff was injured when a blade guard on a circular table saw struck him in the eye after one of his co-workers left the guard in what appeared to be in the installed position. With respect to his design claims, plaintiff’s expert opined that the saw was “defective” and “unreasonably dangerous” by its design, suggesting that the saw could be designed so that the guard could be attached without tools or that the tools could be physically attached to the saw.<sup>150</sup> The court rejected the claim, holding that the plaintiff and his expert had “wholly failed to show a feasible alternative design that would have reduced the risk of injury.”<sup>151</sup>

In *Hughes v. Battenfeld Gloucester Engineering Co.*,<sup>152</sup> plaintiff Hughes injured his hand while separating and rethreading plastic film through a machine called a secondary treater nip station (“nip station”), which defendant Battenfeld Gloucester Engineering Co., Inc. (“Battenfeld”) designed and manufactured.<sup>153</sup> Hughes admitted that he knew about the dangers associated with using the nip station because he observed co-workers who were injured performing similar tasks.<sup>154</sup> The task performed by Hughes at the time of incident required him to manually route the plastic film into the machine between two driven roller bars.<sup>155</sup> Hughes testified that he was aware of the alleged defect that caused his accident, and on two previous occasions he had filed written suggestions with his employer requesting that it reduce the risk of injury involved.<sup>156</sup>

Hughes filed suit against Battenfeld, alleging negligent design and manufacture. Battenfeld moved for summary judgment. Judge Tinder first recognized that to prevail on a claim under the IPLA, Hughes had to prove that the product was in a defective condition that rendered it unreasonably dangerous.<sup>157</sup> “To be unreasonably dangerous, a defective condition must be hidden or concealed . . . [and] evidence of the open and obvious nature of the danger . . . negates a necessary element of the plaintiff’s prima facie case that the defect was hidden.”<sup>158</sup> Battenfeld argued that the dangerous condition of the nip station was open and obvious.<sup>159</sup> Judge Tinder agreed and entered summary judgment for Battenfeld, finding that the dangers of running the inside treatment orders in the nip station were open and obvious as a matter of law.<sup>160</sup>

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149. 212 F. Supp. 2d at 893.

150. *Id.* at 900.

151. *Id.*

152. 2003 U.S. Dist. LEXIS 17177, at \*1 (S.D. Ind. 2003).

153. *Id.* at \*2-5.

154. *Id.* at \*4.

155. *Id.* at \*2-3.

156. *Id.* at \*3-4.

157. *Id.* at \*7.

158. *Id.* at \*7-8.

159. *Id.* at \*7.

160. *Id.* at \*17.

Although decided a couple of months after the 2003 survey period expired, the Indiana Supreme Court's decision in *City of Gary v. Smith & Wesson Corp.*,<sup>161</sup> is noteworthy and is briefly summarized here. The City of Gary and its mayor sued several handgun manufacturers, distributors, and retailers, alleging, among other claims, negligent design, manufacture, distribution, and sale of guns with inadequate, incomplete, or nonexistent warnings regarding the risks of harm. The city alleged a separate design defect claim against the manufacturers for failure to include adequate safety devices. The court of appeals rejected all such bases of liability, holding that no duty of care existed between the parties because the attenuated relationship between the city and the defendants rendered the connection between the harm alleged by the city and the conduct of the defendants tenuous and remote.<sup>162</sup> The court concluded that the city simply was not a reasonably foreseeable plaintiff injured in a reasonably foreseeable manner.<sup>163</sup>

The Indiana Supreme Court reversed, first concluding that the City's allegations were sufficient to give rise to public nuisance and general negligence claims.<sup>164</sup> The *City of Gary* court also reversed with respect to the City's negligent design claim against the manufacturers.<sup>165</sup> The City contended that the manufacturers

were negligent in designing the handguns in a manner such that the defendants foresaw or should have foreseen that the products would pose unreasonable risks of harm to the citizens of Gary who were unaware of the dangers of a firearm or untrained in the use of handguns, or who are minors or mentally impaired persons.<sup>166</sup>

The City further alleged that the handguns were defective because they lacked

adequate safety devices including, but not limited to, devices that prevent handguns from being fired by unauthorized users, devices increasing the amount of pressure necessary to activate the trigger, devices alerting the users that a round was in the chamber, devices that prevent the firearm from firing when the magazine is removed, and devices to inhibit unlawful use by prohibited or unauthorized users.<sup>167</sup>

Although *City of Gary* recognized that the City is not a purchaser and has no direct claim under "statutory or common law theories," the court nonetheless concluded as follows:

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161. 801 N.E.2d 1222 (Ind. 2003).

162. *City of Gary v. Smith & Wesson Corp.*, 776 N.E.2d 368 (Ind. Ct. App. 2002), *rev'd*, 801 N.E.2d 1222 (Ind. 2003).

163. *City of Gary*, 776 N.E.2d at 388.

164. *City of Gary*, 801 N.E.2d at 1229-47.

165. *Id.* at 1248-49.

166. *Id.* at 1247.

167. *Id.* The City also alleged that the manufacturers "knowingly and intentionally colluded with each other to adhere to unsafe industry customs regarding the design of handguns." *Id.*



[T]o the extent these actions constitute an unreasonable interference with a public right, the City has alleged a claim for a public nuisance. Whether these alleged design defects are unreasonable and the extent to which they contribute to the harm alleged are matters for trial. Similarly, the availability of relief appropriate to any unreasonable interference, given that the defendant's products are lawful and the public has a right to acquire them may present substantial obstacles to the City's claim.<sup>168</sup>

The court, therefore, held that "at th[e] pleading stage . . . the City has stated a claim for relief."<sup>169</sup>

## II. LIMITATIONS AND REPOSE ISSUES

### A. *Statute of Limitations*

The IPLA provides, in relevant part, that "a product liability action must be commenced within two (2) years after the cause of action accrues, or within ten (10) years after the delivery of the product to the initial user or consumer."<sup>170</sup> Practitioners and judges alike generally refer to the first clause of that statute as the statute of limitations and to the latter as the statute of repose.

The IPLA does not define the meaning of "accrues" for purposes of fixing the two-year statute of limitations generally applicable to all product liability actions in Indiana. Indiana courts nevertheless have adopted a discovery rule for the accrual of tort-based damage claims caused by an allegedly defective product. In *Degussa Corp. v. Mullens*,<sup>171</sup> the Indiana Supreme Court held that the date upon which a product liability claim accrues depends upon a subjective analysis of a patient's communications with his or her doctor about when a causal link between a disease and the defendant's product is established.<sup>172</sup> "Once a plaintiff's doctor expressly informs the plaintiff that there is a 'reasonable possibility, if not a probability' that an injury was caused by an act or product, then the statute of limitations begins to run and the issue may become a matter of law."<sup>173</sup>

When a doctor so informs a potential plaintiff, the plaintiff is deemed to have sufficient information such that he or she should promptly seek 'additional medical or legal advice needed to resolve any remaining uncertainty or confusion' regarding the cause of his or her injuries, and therefore be able to file a claim within two years of being informed of a reasonably possible or likely cause.<sup>174</sup>

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168. *Id.* at 1248.

169. *Id.*

170. IND. CODE § 34-20-3-1(b) (1999).

171. 744 N.E.2d 407, 410-11 (Ind. 2001).

172. *Id.* at 410-11.

173. *Id.* at 411 (quoting *Van Dusen v. Stotts*, 712 N.E.2d 491, 499 (Ind. 1999)).

174. *Id.* (quoting *Van Dusen*, 712 N.E.2d at 499). In addition,

In *Dorman v. Osmose, Inc.*,<sup>175</sup> plaintiff Dorman injured his shin on a piece of freshly-cut treated lumber on June 23, 1996. Dorman did not know at that time that the wood had been treated with cromated copper arsenate ("CCA"). A week after the accident, the injured area had become red, swollen, and infected. On June 29, 1996, Dorman's treating physician diagnosed him with cellulitis and advised him that treated wood had "some nasty stuff" in it.<sup>176</sup> The physician stopped short, however, of overtly linking the injury to any particular chemical in the wood. At that time, Dorman believed that the wood had been treated with salt.

More than a year later, in August 1997, Dorman's leg was reportedly swollen, red, and painful.<sup>177</sup> Another physician diagnosed Dorman with "cellulitis with ascending lymphadenitis." The second physician did not connect Dorman's condition to the treated wood. In December 1999, Dorman approached an attorney regarding his injury and claimed that he learned for the first time that treated wood contained CCA.<sup>178</sup> On May 5, 2000, Dorman consulted a third physician, who issued a medical report concluding that the CCA in the treated wood caused his injury. Dorman filed suit shortly thereafter on June 30, 2000.

Dorman filed suit based upon negligence and product liability theories. The

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[a]n unexplained failure to seek additional information should not excuse a plaintiff's failure to file a claim within the statutorily defined time period. Although "events short of a doctor's diagnosis can provide a plaintiff with evidence of a reasonable possibility that another's" product caused his or her injuries, a plaintiff's mere suspicion or speculation that another's product caused the injuries is insufficient to trigger the statute.

*Id.* (citations omitted); see *Barnes v. A.H. Robins Co.*, 476 N.E.2d 84, 87-88 (Ind. 1985) (stating that a cause of action accrues when the claimant knew or should have discovered that he or she "suffered an injury or impingement, and that it was caused by the product or act of another"); see also Nelson A. Nettles, *When Does a Product Liability Claim 'Accrue'? When Is It 'Filed'?*, IND. LAW., May 9, 2001, at 23.

In *Nelson v. Sandoz Pharmaceuticals Corp.*, 288 F.3d 954 (7th Cir. 2002), a case decided during last year's survey period, the Seventh Circuit followed *Degussa*. In that case, the trial court granted summary judgment to a pharmaceutical manufacturer based on the IPLA statute of limitations. *Id.* at 958. After concluding that Indiana law applied, the Seventh Circuit reversed. *Id.* at 965. The court first cited *Degussa* for the proposition that the statute of limitations runs from the date that plaintiff knew or should have discovered that she suffered an injury or impingement and that it was caused by the product or act of another. *Id.* at 966. According to the Seventh Circuit, the plaintiff's suspicion, standing alone, was insufficient to trigger the limitations period. *Id.* at 966-67. The court held that the period begins to run if a physician suggests reasonable possibility, if not a probability, of a causal connection between the illness alleged and the product involved. *Id.*

175. 782 N.E.2d 463 (Ind. Ct. App.), *trans. denied*, 792 N.E.2d 46 (Ind. 2003).

176. *Id.* at 464-65.

177. *Id.* at 465.

178. *Id.*



trial court granted summary judgment in favor of the defendants based upon the IPLA's statute of limitations.<sup>179</sup> Dorman appealed, and the court of appeals reversed. In doing so, the *Dorman* court relied upon *DeGussa*, writing that "[o]nce a plaintiff's doctor expressly informs the plaintiff that there is a 'reasonable possibility, if not a probability' that an injury was caused by an act or product, then the statute of limitations begins to run and the issue may become a matter of law."<sup>180</sup> Noting that "*a plaintiff's mere suspicion or speculation that another's product caused the injuries is insufficient to trigger the statute[,]*"<sup>181</sup> the *Dorman* court concluded that Dorman's speculation about the connection between his leg problem and the treated lumber was not enough to trigger the limitations period as a matter of law.<sup>182</sup>

In *Detrex Chemical Industries, Inc. v. Skelton*,<sup>183</sup> the plaintiff began having nosebleeds, chest congestion and breathing problems in December 1995. In 1996, plaintiff was diagnosed with chronic obstructive pulmonary disease ("COPD"), which was aggravated by his inhalation of fumes in the workplace. The treating physician believed that plaintiff's disease was caused by asthma.<sup>184</sup> In spite of his doctor's diagnosis, plaintiff suspected that his health problem was related to his workplace, and he began gathering information about the chemicals he worked near. Also, in February 1996, plaintiff filed a *pro se* workers compensation action based upon exposure to chemical fumes at work. Plaintiff consulted with another physician in October 1996, and the second physician tested for allergies and the presence of chemicals, and diagnosed plaintiff with allergies, asthma and a poorly functioning immune system. In August 1997, the second physician linked plaintiff's COPD with his chemical exposure. In November 1998, plaintiff visited another doctor who did not find a link between plaintiff's health problems and his occupational chemical exposure. Finally, in April 1999, plaintiff consulted another physician who concluded that plaintiff's occupational chemical exposure "was most certainly responsible for [plaintiff's] condition."<sup>185</sup>

In May of 1999, plaintiff filed his complaint. Thereafter, defendants filed motions for summary judgment based upon the statute of limitations. The trial court denied the defendants' motions, defendants appealed, and the appellate panel affirmed.<sup>186</sup> Just as was the case in *Dorman*, the court began its substantive discussion with *Degussa*: "[W]hile events short of a doctor's diagnosis can provide a plaintiff with evidence of a reasonable possibility that a product caused his or her injuries, a plaintiff's mere suspicion or speculation that the product

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179. *Id.* at 464.

180. *Id.* at 467 (quoting *DeGussa Corp. v. Mullens*, 744 N.E.2d 407, 410-11 (Ind. 2001)).

181. *Id.* (emphasis in original).

182. *Id.* 469-70.

183. 789 N.E.2d 75 (Ind. Ct. App. 2003).

184. *Id.*

185. *Id.* at 77.

186. *Id.* at 77, 80.

caused the injuries is insufficient to trigger the statute.”<sup>187</sup> Defendants argued that, as early as April 3, 1997, plaintiff should have known that there was a reasonable possibility, if not probability that his health problems had been caused by chemicals.<sup>188</sup> However, the court noted that during that same period of time, plaintiff heard from other doctors that his condition was not from occupational chemical exposure, and plaintiff also was advised that he had various allergies.<sup>189</sup> Despite the evidence that plaintiff had begun taking precautions to protect himself from chemical exposure at work in 1995 and 1996, the *Detrex* panel held that the limitations period did not begin to run at that time.<sup>190</sup> The conflicting evidence related to plaintiff’s health condition caused the court to hold that “whether the statute of limitations had run on [plaintiff’s] claim is a question of fact for resolution at trial.”<sup>191</sup>

Although the Indiana Supreme Court in *Degussa* advises that factors short of a physician’s diagnostic causal link between the defendant and the injury may trigger the IPLA’s limitations period,<sup>192</sup> Indiana appellate courts during this survey period have been noticeably reluctant to find anything short of just such a diagnostic connection sufficient to trigger it.

### B. Statute of Repose

Indiana Code section 34-20-3-1 provides, in relevant part, that “a product liability action must be commenced within . . . ten (10) years after the delivery of the product to the initial user or consumer.”<sup>193</sup> The statute of repose gets a little more complicated in the last two years of the 10-year period mentioned above. Indiana Code section 34-20-3-1(b) provides that “if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.”<sup>194</sup> Practitioners should be wary here in light of some very specific statutory language. Note that subsection (b) grants the full two-year limitations period after accrual if the cause of action accrues at least eight years but less than ten years after initial delivery. If accrual occurs ten years to the day after the initial delivery, it would appear as though suit must be filed that day because the additional two-year period only applies if accrual occurs at any time less than ten years after initial delivery.

Recent case law confirms that there are at least two situations in which a manufacturer can be liable even beyond ten years after delivery to the initial user or consumer: (1) when the manufacturer supplies replacement parts for the

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187. *Id.* at 78.

188. *Id.* at 79.

189. *Id.*

190. *Id.* at 79-80.

191. *Id.* at 80.

192. *DeGussa Corp. v. Mullens*, 744 N.E.2d 407, 411 (Ind. 2001).

193. IND. CODE § 34-20-3-1(b) (1998).

194. *Id.*



product and the replacement parts are the cause of the plaintiffs' injury; and (2) when the manufacturer rebuilds the product, such that the rebuild significantly extends the life of the product and thereby renders it in like-new condition.

The Indiana Supreme Court has recognized the utility and underlying policy justifications for the existence of a statute of repose, and has reaffirmed that the wisdom of the policy underlying a product liability statute of repose is a question for the legislature.<sup>195</sup> Moreover, the Indiana Supreme Court in *McIntosh v. Melroe Co.*,<sup>196</sup> has held that application of the statute of repose does not violate article I, sections 12 or 23 of the Indiana Constitution.<sup>197</sup>

Product liability cases involving asbestos products are unique in several ways, including the manner by which the Indiana General Assembly chose to handle the repose period that applies to them. Indiana Code section 34-20-3-2(a)<sup>198</sup> provides that "[a] product liability action that is based on: (1) property damage resulting from asbestos; or (2) personal injury, disability, disease, or death resulting from exposure to asbestos: must be commenced within two (2) years after the cause of action accrues."<sup>199</sup> That exception applies, however, "only to product liability actions against persons who mined and sold commercial asbestos; and (2) to funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims."<sup>200</sup>

The phrase "persons who mined and sold commercial asbestos"<sup>201</sup> had been a source of controversy for several years. Plaintiffs argued that the "and" should be read as an "or." Many defendants, on the other hand, have contended that Indiana Code section 34-20-3-2 creates an exception to the limitations and repose periods only for claims against those entities that *both* mined *and* sold commercial asbestos, and that the term "commercial" has a very specific meaning. Until March 25, 2003, when the Indiana Supreme Court issued a much-

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195. *Shebel v. Yaskawa Elec. Am., Inc.*, 713 N.E.2d 275, 278 (Ind. 1999).

196. 729 N.E.2d 972 (Ind. 2000).

197. During last year's survey period, the U.S. Court of Appeals for the Seventh Circuit recognized and applied *McIntosh* in *Land v. Yamaha Motor Corp.*, 272 F.3d 514 (7th Cir. 2001), a case in which the court concluded that the statute of repose cannot be circumvented by claiming that the manufacturer continued its negligence after the initial sale by failing to warn customers of known dangers and that post-sale failure-to-warn claims merge with the underlying product liability claims that are barred, in their entirety, by the statute of repose. *Id.* at 518. In response to an argument that the statute of repose was unconstitutional, the Seventh Circuit also noted that *McIntosh* already had conclusively addressed that issue. *Id.*

198. IND. CODE § 34-20-3-2(a) (1998) (amending *id.* § 33-1-1.5-5.5).

199. *Id.* The statute further provides that an action accrues "on the date when the injured person knows that the person has an asbestos related disease or injury," *id.* § 34-20-3-2(b), and that the "subsequent development of an additional asbestos related disease or injury is a separate cause of action." *Id.* § 34-20-3-2(a).

200. *Id.* § 34-20-3-2(d).

201. *Id.*

anticipated decision in *AlliedSignal Inc. v. Ott*,<sup>202</sup> various Indiana appellate courts answered those questions in divergent ways, most in favor of plaintiffs.

The string of appellate decisions preceding *Ott* began in 1989, shortly after the General Assembly approved what is now Indiana Code section 34-20-3-2. In *Covalt v. Carey Canada, Inc.*,<sup>203</sup> the majority held that the statutory language now appearing in Indiana Code section 34-20-3-1 did not apply "to cases involving protracted exposure to an inherently dangerous foreign substance [that] is visited into the body."<sup>204</sup> While the *Covalt* court was deliberating its decision, the General Assembly approved the language for what is now Indiana Code section 34-20-3-2.<sup>205</sup>

In 2001 and early 2002, majorities of six separate panels of the Indiana Court of Appeals in *Black v. ACandS, Inc.*,<sup>206</sup> *Poirier v. A.P. Green Services, Inc.*,<sup>207</sup> *Fulk v. AlliedSignal, Inc.*,<sup>208</sup> *Parks v. A.P. Green Industries, Inc.*,<sup>209</sup> *AlliedSignal, Inc. v. Herring*,<sup>210</sup> and *Harris v. ACandS, Inc.*,<sup>211</sup> held that Indiana Code section 34-20-3-2's exception to the IPLA repose period applies to entities that mined commercial asbestos, even if they did not sell it, and to entities that sold commercial asbestos, even if they did not mine it. Each of those cases involved workers or their estates who claimed injury or death as the result of working with

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202. 785 N.E.2d 1068 (Ind. 2003).

203. 543 N.E.2d 382 (Ind. 1989).

204. *Id.* at 385.

205. *Id.* at 383 n.1. Nine years after *Covalt*, the repose issue in asbestos cases returned to the fore. *Roberts v. ACandS, Inc.*, 1998 U.S. Dist. LEXIS 22635, at \*12-13 (S.D. Ind. 1998). Judge Larry McKinney of the United States District Court for the Southern District of Indiana held that section 1 barred claims made against a manufacturer of an asbestos-containing product that accrued more than ten years after the delivery of the product to its initial user and consumer. In doing so, Judge McKinney determined that what is now chapter 3, section 2 applied only to entities that both mined and sold commercial asbestos. *Id.* Less than a year later, the Indiana Court of Appeals in *Sears Roebuck and Co. v. Noppert*, 705 N.E.2d 1065, 1068 (Ind. Ct. App. 1999), reached the same conclusion as part of a larger discussion about the timeliness of a post-judgment motion filed pursuant to Rule 60(B) of the Indiana Rules of Trial Procedure: "[W]hile courts in Indiana have on occasion construed an 'and' in a statute to be an 'or,' we find that there is no ambiguity in this statute requiring such an interpretation." *Id.* In *Novicki v. Rapid-American Corp.*, 707 N.E.2d 322 (Ind. Ct. App. 1999), another panel of the court of appeals, citing *Noppert*, recognized that chapter 3, section 2's exception to the statute of repose applied only to entities that both mined and sold commercial asbestos. *Id.*

206. 752 N.E.2d 148, 162 (Ind. Ct. App. 2001), *vacated and remanded by* *Black v. ACandS, Inc.*, 785 N.E.2d 1084 (Ind. 2003).

207. 754 N.E.2d 1007, 1012 (Ind. Ct. App. 2001).

208. 755 N.E.2d 1198, 1206 (Ind. Ct. App. 2001).

209. 754 N.E.2d 1052, 1061 (Ind. Ct. App. 2001).

210. 757 N.E.2d 1030, 1037 (Ind. Ct. App. 2001), *vacated and remanded by* *AlliedSignal, Inc. v. Herring*, 785 N.E.2d 1090 (Ind. 2003).

211. 766 N.E.2d 383 (Ind. Ct. App. 2002), *vacated and remanded by* *Harris v. ACandS, Inc.*, 785 N.E.2d 1087 (Ind. 2003).



or around asbestos-containing products. The claimants sued sellers of asbestos-containing products, alleging damages caused by inhalation of asbestos dust. The following language from the majority opinion in *Black* provides the underpinning for the rulings:

Clearly, the intent of the legislature in enacting [Indiana Code section 34-20-3-2] was at least in part to acknowledge the long latency period of asbestos-related injuries. Without the [Indiana Code section 34-20-3-2] exception, the statute of limitations and statute of repose would be meaningless for the vast majority of people harmed by exposure to asbestos. Asbestos-related injuries would truly be a wrong without a remedy. Equally clear is that the legislature thus could not have intended by enacting [Indiana Code section 34-20-3-2] to so severely limit the means of recovery.<sup>212</sup>

Judge Mathias wrote a lengthy dissenting opinion in *Black*, concluding that the statute of repose on its face is unambiguous and clearly applies only to those companies who both mined and sold commercial asbestos, not all sellers of asbestos-containing products.<sup>213</sup>

In *Jurich v. Garlock, Inc.*,<sup>214</sup> yet another panel of the court of appeals weighed in. Although the *Jurich* court recognized the *Black* majority's conclusion as "reasonable," it disagreed that the defendants sold "commercial asbestos."<sup>215</sup> The *Jurich* court determined that the defendants sold asbestos-containing products, not "commercial asbestos," which referred to either raw or processed asbestos that is incorporated into other products.<sup>216</sup> The *Jurich* court went on, however, to conclude that the application of Indiana Code section 34-20-3-1 to the plaintiff under the facts presented in the case violated article I, section 12 of the Indiana Constitution.<sup>217</sup>

The *Ott* case involved a direct appeal from the Allen County Superior Court. The trial court issued an order denying motions for summary judgment based on the statute of repose. The defendants that filed those motions argued that they had not mined and sold commercial asbestos.<sup>218</sup> The trial court, citing *Noppert*, first concluded that Indiana Code section 34-20-3-2's exception did not apply to the moving defendants. The trial court, however, went on to conclude that Indiana Code section 34-20-3-1, as applied to Mrs. Ott, violated article I, section 12 and article I, section 23 of the Indiana Constitution. The trial judge certified his orders for interlocutory appeal.<sup>219</sup> Because of the conflicting opinions of the court of appeals, the moving defendants petitioned the Indiana Supreme Court

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212. *Black v. ACandS, Inc.*, 752 N.E.2d 148, 152 (Ind. Ct. App. 2001).

213. *Id.* at 158 (Mathias, J., dissenting).

214. 759 N.E.2d 1066 (Ind. Ct. App. 2001).

215. *Id.* at 1069-70.

216. *Id.*

217. *Id.* at 1077.

218. *AlliedSignal, Inc. v. Ott*, 785 N.E.2d 1068 (Ind. 2003).

219. *Id.*

for emergency transfer to resolve the conflict.<sup>220</sup>

The 3-2 majority in *Ott* held that Indiana Code section 34-20-3-1 bars claims against manufacturers that did not sell bulk asbestos fiber for asbestos-related injuries accruing more than ten years after the initial delivery.<sup>221</sup> In doing so, the court concluded that the asbestos-specific “discovery rule” exception to the ten-year repose period<sup>222</sup> does not apply to manufacturers that did not sell bulk asbestos fiber.<sup>223</sup> The *Ott* court also held that application of the ten-year statute of repose does not violate “due process” guarantees provided by article I, section 23 of the Indiana Constitution.<sup>224</sup> The court, however, left open pending further factual findings whether, as applied, the statute of repose violates article I, section 12 of the Indiana Constitution.<sup>225</sup>

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220. On November 16, 2001, the Indiana Supreme Court accepted the petition and held oral argument on May 16, 2002.

221. *Ott*, 785 N.E.2d at 1073.

222. IND. CODE § 34-20-3-2 (1998) (formerly *id.* § 33-1-1.5-5.5).

223. *Ott*, 785 N.E.2d at 1073.

224. *Id.* at 1075-77. Article I, section 23 of the Indiana Constitution provides: “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall no equally belong to all citizens.” IND. CONST. art. I, § 23. Before it could apply the *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994), analysis, the *Ott* majority concluded that it first had to determine what legislative classification was at issue. *Ott*, 785 N.E.2d at 1077. It defined the classification at issue as “asbestos victims in Indiana are bound by the statute of repose governing product liability actions when suing particular categories of defendants but are not so constrained when suing others. Thus, the statute creates a distinction between asbestos victims and other victims under the product liability act.” *Id.* The *Ott* majority concluded that because the distinction worked in favor of asbestos plaintiffs, the distinction is constitutionally permissible. *Id.* (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347-48 (1936)) (“The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.”). In a footnote, the *Ott* majority addressed an issue raised by *amicus* regarding whether or not Indiana Code section 34-20-3-2 was unconstitutional as applied to miners stating that because “such a claim does not impact any party in the present case, we will not address [Indiana Code section 34-20-3-2]’s constitutionality as applied to miners at this time.” *Id.* The court’s footnote raises other additional questions. Is Indiana Code section 34-20-3-2 facially unconstitutional? If deemed unconstitutional, how would that affect asbestos plaintiffs given the language in Indiana Code section 34-20-3-2(e) that indicates that if any portion of it is deemed unconstitutional, all of it would be stricken?

225. *Ott*, 785 N.E.2d at 1077. Article I, section 12 of the Indiana Constitution provides: “All courts shall be open; and every person, for injury done to him in his person, property, or reputation, Shall have remedy by due course of law.” IND. CONST. art. I, § 12. The *Ott* majority began its constitutional analysis with a lengthy quote from *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999), a case holding that article I, section 12 precludes the application of a two-year medical malpractice statute of limitations when a plaintiff has no meaningful opportunity to file an otherwise valid tort claim within the specified statutory period, because, given the nature of the asserted malpractice and the resulting injury or medical condition, he is unable to discover that he has a cause of action. The *Ott* majority determined that when evaluating Indiana Code section 34-20-3-1 under article I,



Justice Dickson, in a dissenting opinion joined by Justice Rucker, challenged each of the conclusions reached by the majority.<sup>226</sup> Justice Dickson relied heavily on *Black* for his reasoning challenging the interpretation of Indiana Code section 34-20-3-2.<sup>227</sup>

The *Ott* decision, in practical effect, reversed the *Ott* trial court and overruled *Black*, *Poirier*, *Fulk*, *Parks*, *Herring*, and *Harris* to the extent that those decisions interpreted Indiana Code section 34-20-3-2 to apply to manufacturers of all products that contained asbestos. It also overruled *Jurich* with respect to the article I, section 23 issue, and rejected much of the *Jurich* analysis with respect to the article I, section 12 issue. In addition, the *Ott* majority overruled *Covalt* to the extent any inconsistencies existed between the two decisions.

We stated in *Covalt* that the applicability of the holding in that case was limited to “the precise factual pattern presented,” which involved exposure to raw asbestos fibers. . . . Thus *Covalt* can be read as consistent with the effect of [Indiana Code section 34-20-3-2] in that it relieved asbestos plaintiffs from the statue of repose in a lawsuit against

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section 12, the key question is when the injury occurred. *Ott*, 785 N.E.2d at 1074.

The Indiana Supreme Court considered several factual scenarios in evaluating the application of Indiana Code section 34-20-3-1. First, it considered a scenario where a plaintiff had been exposed to asbestos fibers from a product more than ten years after the product had been delivered to its initial user or consumer and concluded that *McIntosh* would apply to bar the claim. *Id.* The majority next addressed a scenario where a plaintiff “is injured by a product within ten years of its initial delivery, but who has neither knowledge of nor any ability to know of that injury until more than ten years have passed,” concluding that such a scenario implicated *Richey*. *Id.* The *Ott* majority determined that a cause of action “accrues” when “the disease has actually manifested itself.” *Id.* at 1075. In reaching this definition, the *Ott* majority acknowledged that “it is difficult to reconcile science and law,” noting that injury “does not occur upon mere exposure to (or inhalation of) asbestos fibers” but that “injury may well occur before the time that it is discovered.” *Id.* The *Ott* majority then concluded that Indiana Code section 34-20-3-1 “might be unconstitutional as applied to the plaintiff if a reasonably experienced physician could have diagnosed Jerome Ott with an asbestos-related illness or disease within the ten-year statute of repose, yet Ott had no reason to know of the diagnosable condition until the ten-year period had expired.” *Id.* (emphasis added). Because the record had not been developed to address that issue, the case was remanded to the trial court for further proceedings. *Id.*

226. *Id.* at 1078-84 (Dickson, J., dissenting) (challenging the definition of “commercial asbestos,” the failure to substitute “or” for “and” in Indiana Code section 34-20-3-2, the article I, section 12 analysis, and the article I, section 23 analysis).

227. *Id.* at 1080-81 (Dickson, J., dissenting). Indeed, Justice Dickson cites *Black* for the proposition that

[b]ecause the statute of repose is concerned not with the introduction of the asbestos into the marketplace but with exposure to the hazardous foreign substance that causes disease, an interpretation of the statute that permits or denies recovery based solely on the nature of the entity that introduced the asbestos into the marketplace cannot stand.

*Id.* (citing *Black v. ACandS*, 752 N.E.2d 148, 154 (Ind. Ct. App. 2001)).

a supplier of commercial asbestos.<sup>228</sup>

### III. DEFENSES

#### *A. Use with Knowledge of Danger (Incurred Risk)*

Indiana Code section 34-20-6-3 provides that “[i]t is a defense to an action under [the IPLA] that the user or consumer bringing the action: (1) knew of the defect; (2) was aware of the danger in the product; and (3) nevertheless proceeded to make use of the product and was injured.”<sup>229</sup> Incurred risk is a defense that “involves a mental state of venturousness on the part of the actor and demands a subjective analysis into the actor’s actual knowledge and voluntary acceptance of the risk.”<sup>230</sup> At least one Indiana court has held in the summary judgment context that application of the incurred risk defense requires evidence without conflict from which the sole inference “to be drawn is that the plaintiff had actual knowledge of the specific risk and understood and appreciated that risk.”<sup>231</sup>

In *Vaughn v. Daniels Co.*,<sup>232</sup> discussed above in connection with the “user/consumer” and the “unreasonably dangerous” issues, defendant Daniels Company (“Daniels”) designed a coal preparation plant. A contractor constructed the plant, including the assembly of three coal sumps according to Daniels’ blueprints and specifications. Plaintiff Vaughn, an employee of the contractor, was injured while installing one of the coal sumps into the coal preparation plant.<sup>233</sup> In an effort to aid his co-workers in installation, Vaughn climbed onto the sump without his safety belt while a pipe was maneuvered through the wall of the plant by a forklift and raised to the level of the sump.

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228. *Id.* at 1077.

229. IND. CODE § 34-20-6-3 (1998).

230. *Cole v. Lantis Corp.*, 714 N.E.2d 194, 200 (Ind. Ct. App. 1999).

231. *Id.* Indiana courts have decided some important incurred risk cases in the last few years. *E.g.*, *Smock Materials Handling Co. v. Kerr*, 719 N.E.2d 396 (Ind. Ct. App. 1999) (finding no basis for the incurred risk defense under the facts of that case; plaintiff had no knowledge of the fact that the manufacturer had changed the design of the lift so as to eliminate pins that would have prevented rods from falling unexpectedly from the lift cups underneath the lift platform); *Hopper v. Carey*, 716 N.E.2d 566 (Ind. Ct. App. 1999) (because the plaintiffs did not adequately specify the basis of their claim, the court was unclear whether the defect in the fire truck was open and obvious or whether warnings were placed on the truck informing the passengers of the specific risk from which the Hoppers’ injuries resulted, and the court was unable to determine the applicability of the incurred risk defense); *Cole v. Lantis Corp.*, 714 N.E.2d 194 (Ind. Ct. App. 1999) (because plaintiff’s job necessarily entailed moving containers across gap between aircraft and aircraft loading equipment and his apparent belief that he had to somehow find a way to work around the known danger posed by the gap, the majority concluded that whether plaintiff voluntarily incurred the risk of falling through the gap was a fact question for the jury’s resolution).

232. 777 N.E.2d 1110 (Ind. Ct. App. 2002), *clarified on rehearing* 782 N.E.2d 1062.

233. *Id.* at 1116.



After raising the pipe, workers wrapped a chain around the pipe to support it as the forklift pulled away. The chain gave way, the pipe slipped, and Vaughn fell.<sup>234</sup>

One of Daniels' arguments was that Vaughn knew and appreciated the risk of falling and failed to take proper precautions despite his knowledge. It was undisputed that Vaughn understood and appreciated the risks of working at heights and the need to wear a safety belt. He was, in fact, wearing his belt until moments before the accident, but he did not put it back on before rushing to the sump to assist his co-worker.<sup>235</sup> The trial court agreed, finding that Vaughn "knew and appreciated the risk of falling that came with not being properly [fastened] while working at heights and despite his knowledge and appreciation of this risk, failed to take proper safety precautions."<sup>236</sup>

Vaughn countered that his failure to wear his safety belt was not voluntary under the circumstances because he was rushing to help his co-workers who needed assistance. Thus, Vaughn argued that "although he knew of the general risks of working at heights without wearing a safety belt, his failure to do so in this case was reasonable because of the need to help his co-workers."<sup>237</sup> In addition, Vaughn pointed to his deposition testimony in which he stated that he had no place to fasten his safety belt while working on the sump at issue and that there had been a handrail around another sump he had previously installed onto which he could fasten the belt.

Focusing on the phrase "actual knowledge of the specific risk" and taking its cue from *Ferguson v. Modern Farm Systems, Inc.*,<sup>238</sup> the court reasoned as follows:

It is true that the undisputed designated evidence is that Vaughn understood the danger of working at heights over six feet without a safety belt and yet climbed to the top of the sump to install the pipe without wearing it or tying off. . . . That being said, however, there remains a question concerning the voluntariness of the failure to wear the belt given the urgent need of the coworkers for help. There is also the risk of working on the sump without a handrail as a result of the allegedly defective design. There remain questions as to whether Vaughn was fully aware that the sump had no handrail before he went up the ladder and that he fully understood the risk of being on the sump without a handrail such that he really could have voluntarily undertaken the task of installing the pipe even in spite of the danger.<sup>239</sup>

Accordingly, the *Vaughn* court held that questions of fact existed "relating to whether Vaughn incurred the risk, and, therefore, summary judgment is not

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234. *Id.*

235. *Id.* at 1132.

236. *Id.* at 1131.

237. *Id.* at 1132.

238. 555 N.E.2d 1379 (Ind. Ct. App. 1990).

239. *Vaughn*, 777 N.E.2d at 1132.

appropriate.<sup>240</sup>

It is important to note here that, in discussing the incurred risk defense, the *Vaughn* court wrote that Indiana Code section 34-20-6-3 "provides a *complete defense* where a plaintiff incurs the risks associated with the use of a product."<sup>241</sup> The use of the term "complete" is not insignificant. A "complete" defense in this context is one that, if the requirements to establish it are met, relieves a defendant of liability and automatically eliminates any need for fault allocation. Incurred risk, misuse, and alteration/modification were "complete" defenses to IPLA claims before the 1995 amendments.<sup>242</sup>

As the *Vaughn* court seems to have recognized, incurred risk should remain a complete defense. When the General Assembly amended in 1995 what is now Indiana Code section 34-20-6-3(3), it eliminated the word "unreasonably" from the phrase that previously read "nevertheless proceeded 'unreasonably' to make use of the product." The language choice tends to support the proposition that incurred risk is not subject to fault apportionment. In addition, and perhaps even more compelling, is the fact that the definition of "fault" for cases governed by the Comparative Fault Act includes a plaintiff's assumed or incurred risk, whereas the definition of "fault" for purposes of the IPLA does not.<sup>243</sup> It follows, therefore, that an IPLA plaintiff's incurred risk, because it is not "fault" under the IPLA, should not be subject to fault apportionment.

In addition to *Vaughn*, the opinion by the court of appeals in *Hopper v. Carey* provides support for the proposition that incurred risk remains a complete defense in Indiana.<sup>244</sup>

240. *Id.*

241. *Id.* at 1130 (emphasis added).

242. *E.g.*, *Estrada v. Schmutz Mfg. Co.*, 734 F.2d 1218 (7th Cir. 1984) (misuse); *Foley v. Case Corp.*, 884 F. Supp. 313 (S.D. Ind. 1994) (modification/alteration); *Perdue Farms, Inc. v. Pryor*, 646 N.E.2d 715 (Ind. Ct. App. 1995) (incurred risk).

243. Indiana Code section 34-6-2-45(b) defines "fault" for cases governed by the Comparative Fault Act and includes within that definition the "unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages." IND. CODE § 6-2-45(b) (1999). Indiana Code section 34-6-2-45(a) defines "fault" for cases governed by the IPLA, and, although it tracks the definition in section (b) closely, conspicuously eliminates any reference to assumption of risk and incurred risk. "Fault" for purposes of the IPLA means:

[A]n act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term includes . . . [u]nreasonable failure to avoid an injury or to mitigate damages and [a] finding under IC 34-20-2 . . . that a person is subject to liability for physical harm caused by a product, notwithstanding the lack of negligence or willful, wanton, or reckless conduct by the manufacturer or seller.

*Id.* § 34-6-2-45(a).

244. 716 N.E.2d 566, 576 (Ind. Ct. App. 1999) (quoting *Koske v. Townsend Eng'g Co.*, 551 N.E.2d 437, 441 (Ind. 1990)) ("[E]ven if a product is sold in a defective condition unreasonably dangerous, recovery *will be denied* an injured plaintiff who had actual knowledge and appreciation of the specific danger and voluntarily accepted the risk.") (emphasis added).



### B. Misuse

Indiana Code section 34-20-6-4 provides that “[i]t is a defense to an action under [the IPLA] that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.”<sup>245</sup> Knowledge of a product’s defect is not an essential element of establishing the misuse defense.

As noted above, the facts necessary to prove the defense of “misuse” many times will be similar or identical to the facts necessary to prove either that the product is in a condition not contemplated by reasonable users or consumers<sup>246</sup> or the injury resulted from handling, preparation for use, or consumption that is not reasonably expectable,<sup>247</sup> or both. Thus, in Indiana there are at least three separate statutory standards that might bar liability when injury results from a set of circumstances related to uses that are not reasonably expectable or foreseeable.<sup>248</sup>

Misuse also was an issue in the *Vaughn* case discussed at length earlier in this survey.<sup>249</sup> The trial court found that even if the coal sump could be considered a product, Vaughn’s injuries “were caused by his misuse of the sump, because he knew of and appreciated the risk of falling when working at heights, but failed to use the sump in a foreseeable manner.”<sup>250</sup> The trial court also found that Vaughn misused the sump to the extent that it was not foreseeable for Daniels to expect that Vaughn would “fail to [properly secure himself] when working at heights and for a bolt to ‘foul’ in the steel of the pipe [Vaughn] was attempting to maneuver into place.”<sup>251</sup> Daniels pointed to evidence in the record

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245. IND. CODE § 34-20-6-4 (1999).

246. *See id.* § 34-20-4-1(1).

247. *See id.* § 34-20-4-3.

248. *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002), illustrates how a set of facts can be analyzed to deny recovery using Indiana Code section 34-20-4-1(1), Indiana Code section 34-20-4-3, or Indiana Code section 34-20-6-4. Recall that the *Burt* case is the one in which the plaintiff was injured by a circular saw’s blade guard. The district court held that there was no evidence that the defendants should have foreseen that someone would leave the blade guard in an incompletely installed position, or that someone would attempt to use the saw with the blade guard improperly attached. To the contrary, the evidence suggest[ed] that the accident was unforeseeable, caused by a very unusual set of factual circumstances.

*Burt*, 212 F. Supp. 2d at 898. Accordingly, the defendants were not liable because the manner in which the injury occurred was not reasonably foreseeable as a matter of law. *Id.* That being the case, the statutory definition in Indiana Code § 34-20-4-1(1) had not been met and the defense of “misuse” in Indiana Code § 34-20-6-4 had been established. *Id.*

249. 777 N.E.2d 1110 (Ind. Ct. App. 2002).

250. *Id.* at 1129.

251. *Id.* at 1130 (quoting Appellant Br.).

confirming that the coal sump at issue was typical of sump designs being utilized in Indiana and across the country, that the purpose of such a sump was to provide a feed to the heavy media cyclone pump, that Vaughn was not using the sump for its intended use at the time he was injured, and that the sump was not capable of being operated for its intended purpose during installation at the time when Vaughn was injured.<sup>252</sup>

Vaughn countered by arguing that “the mere fact the blueprints show that a ladder allowed access into the sump means that he was using the sump in a foreseeable manner.”<sup>253</sup> Vaughn also pointed to his own deposition to the effect that other sites utilizing sumps had steel overhead from which hangers could be used to hold the pipe during installation. Vaughn’s expert added that “‘The design of the facility to house the heavy media sump did not include a beam to suspend a chain hoist to afford safe assembly and maintenance disassembly of heavy and long pipe components’ . . . .”<sup>254</sup>

The court of appeals reversed the trial court’s misuse decision on these facts, concluding that an issue of fact existed with respect to misuse:

Although we are of the opinion that it was foreseeable that workers would be on the sump based on the presence of the ladder, there is conflicting evidence as to the manner in which the pipe was being installed while Vaughn and the other workers were on the top of the sump and whether such use constituted misuse.<sup>255</sup>

Another misuse case is *Barnard v. Saturn Corp.*,<sup>256</sup> a wrongful death action against the manufacturers of an automobile and its lift jack.<sup>257</sup> Plaintiff’s decedent was killed when he used a lift jack to prop up his vehicle while he changed the oil. The jack gave way, trapping the decedent underneath the car.<sup>258</sup> Both manufacturers provided safety warnings regarding proper use of the jack that the decedent did not follow.<sup>259</sup> For example, the decedent failed to block the tires while he used the jack, he used the jack when the vehicle was not on a flat surface, and he got underneath his vehicle while it was raised on the jack—all of these actions were contrary to the warnings provided by the manufacturers.<sup>260</sup> The trial court granted summary judgment to the defendants based upon product misuse, and the Estate appealed.

The *Barnard* court first concluded that product misuse is not a complete bar to recovery in an action brought pursuant to the IPLA: “[W]e believe that the defense of misuse should be compared with all other fault in a case and does not

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252. *Id.* at 1129-30.

253. *Id.*

254. *Id.*

255. *Id.*

256. 790 N.E.2d 1023 (Ind. Ct. App. 2003).

257. *Id.* at 1026-27.

258. *Id.*

259. *Id.* 1026.

260. *Id.* at 1030.



act as a complete bar to recovery in a products liability action.”<sup>261</sup> The *Barnard* court determined that the 1995 Amendments to the IPLA required all fault in cases to be comparatively assessed.<sup>262</sup> “By specifically directing the jury to compare all ‘fault’ in a case, we believe that the legislature intended the defense of misuse to be included in the comparative fault scheme.”<sup>263</sup> Notwithstanding that conclusion, the *Barnard* court ultimately affirmed the grant of summary judgment, holding as a matter of law that “no reasonable trier of fact could find that [the Decedent] was less than fifty percent at fault for his injuries.”<sup>264</sup>

*Barnard* adds yet another case to the conflict among published decisions with respect to whether product misuse is a “complete” defense that relieves a defendant of liability, automatically eliminating any need for fault allocation.<sup>265</sup> Two cases, *Indianapolis Athletic Club v. Alco Standard Corp.*<sup>266</sup> and *Morgen v. Ford Motor Co.*,<sup>267</sup> have held that a misuse is a “complete” defense under the IPLA. Indiana courts view the “misuse” defense as “complete” because the existence of facts giving rise to the defense amounts to an unforeseeable intervening cause that relieves the manufacturer of liability as a matter of law.<sup>268</sup> *Barnard* joins a Seventh Circuit decision, *Chapman v. Maytag Corp.*,<sup>269</sup> in determining that “misuse” of a product falls within the scope of the IPLA’s definition of “fault.”<sup>270</sup> The *Chapman* court concluded that because a jury is directed to compare all “fault” in a case, the district court did not abuse its discretion in determining that the IPLA requires “misuse” be part of the comparative fault analysis and not a complete defense.<sup>271</sup>

The debate is interesting. The 1995 amendments to the IPLA changed Indiana law with respect to fault allocation and distribution in product liability cases. Indeed, the Indiana General Assembly provided that a defendant cannot be liable for more than the amount of fault directly attributable to that defendant, as determined pursuant to Indiana Code section 34-20-8-1, nor can a defendant “be held jointly liable for damages attributable to the fault of another defendant.”<sup>272</sup> In addition, the IPLA now requires the trier of fact to compare the “fault” (as the term is defined by statute) “of the person suffering the physical harm, as well as the ‘fault’ of all others who caused or contributed to cause the

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261. *Id.* at 1029.

262. *Id.* at 1030.

263. *Id.*

264. *Id.* at 1031.

265. Before the 1995 amendments to the IPLA, misuse was a “complete” defense. *E.g.*, *Estrada v. Schmutz Mfg. Co.*, 734 F.2d 1218 (7th Cir. 1984).

266. 709 N.E.2d 1070, 1072 (Ind. Ct. App. 1999).

267. 762 N.E.2d 137, 143 (Ind. Ct. App. 2002).

268. *Id.*

269. 297 F.3d 682 (7th Cir. 2002).

270. *Id.* at 689.

271. *Id.*

272. IND. CODE § 34-20-7-1 (1998).

harm. . . .”<sup>273</sup> The IPLA mandates that

[i]n assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm.<sup>274</sup>

The statutory definition of “misuse” seems to consider only the objective reasonableness of the foreseeability of the misuse by the seller and not the character of the misuser’s conduct. That would tend to explicitly demonstrate that “misuse” is not “fault.” The district judge in *Chapman* recognized as much. The judge also recognized that the Indiana General Assembly did not specifically exempt misuse from the scope of the comparative fault requirement and a plaintiff’s misuse arguably falls within Indiana Code section 34-6-2-45(a)’s definition of “fault.”

That the General Assembly may not have overtly indicated that it intended to exempt misuse from the scope of the comparative fault requirement does not necessarily mean that it is exempted. After all, it would seem equally likely that the legislature’s silence on the matter indicates an implicit recognition that the “complete” nature of the pre-1995 product liability defenses was to remain that way notwithstanding the introduction of some comparative fault principles *vis-a-vis* defendants and non-parties.

The split in authority will be difficult to resolve without some policy input from the Indiana General Assembly. In the interim, however, it is clear that courts are filling in the blank as best they can absent clear legislative direction.

### C. Modification and Alteration

Indiana Code section 34-20-6-5 provides that

[i]t is a defense to an action under [the IPLA] that a cause of the physical harm is a modification or alteration of the product made by any person after the product’s delivery to the initial user or consumer if the modification or alteration is the proximate cause of the physical harm where the modification or alteration is not reasonably expectable to the seller.<sup>275</sup>

Although this survey Article does not address in detail any modification or alteration cases, practitioners should recognize that the alteration defense examines the change in condition of a product *after* delivery to the initial user or consumer. In this context, it is important to recognize that Indiana Code section 34-20-2-1(3) also incorporates the idea of “substantial alteration.” Chapter 2-1(3) establishes a threshold element of proof an IPLA claimant must affirmatively satisfy in order to state a *prima facie* IPLA claim—specifically, that

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273. *Id.* § 34-20-8-1(a).

274. *Id.* § 34-20-8-1(b).

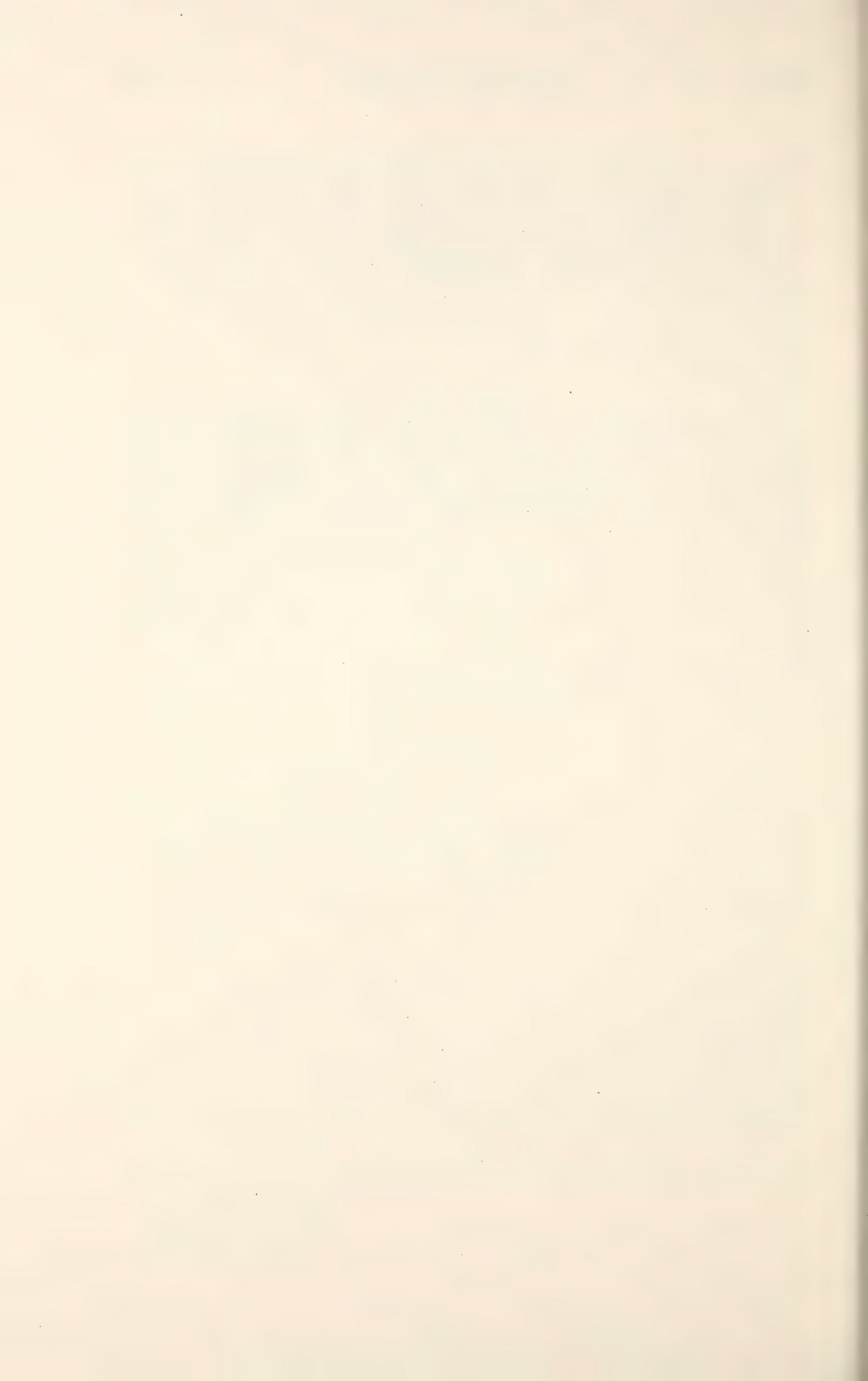
275. *Id.* § 34-20-6-5.



the product is expected to and does reach the user or consumer without substantial alteration in its condition after it is sold by the manufacturer or seller. It certainly appears as though, in the context of chapter 2-1(3), the General Assembly intended the phrase "user or consumer" to mean "initial" user or consumer. If that is, indeed, a correct assumption, then chapter 2-1(3) and chapter 6-5 are intended to apply to two different factual scenarios (chapter 2-1(3) to alterations that occur between time of sale and delivery to the initial user or consumer and chapter 6-5 to alterations that occur between delivery to the initial user or consumer and injury).

#### CONCLUSION

The 2003 survey period joins the 2002 survey period in illustrating that there are some important policy decisions that the IPLA has not resolved. Courts are doing their part to make those decisions absent more clear legislative directive. The coming years promise to remain interesting for product liability practitioners.





# SURVEY ON THE LAW OF PROFESSIONAL RESPONSIBILITY

CHARLES M. KIDD\*

There were several significant matters in various stages of development during the survey period. Among the selected cases are those that deal with the contingent fee. What follows is an examination of the contingent fee and its treatment in Indiana law up to the current year. Also in this edition is an examination of a new creation in the realm of professional regulation of lawyers: the business counsel license.

## I. THE CONTINGENT FEE

### A. *Historical Perspectives*

Use of the contingent fee was originally frowned upon in the practice as being to akin to the concepts of champerty and maintenance.<sup>1</sup> Although disfavored, it was an acceptable way for an attorney to be compensated for his services.<sup>2</sup> As the practice developed, however, the use of the contingent fee was increasingly accepted to the point where, when the *Code of Professional Responsibility* was adopted in Indiana in 1972, the use of the contingent fee was relatively commonplace.<sup>3</sup> This evolution was justified, at least in part, by the rationale that by deferring any legal fees until the actual recovery by the client was in hand, the contingent fee opened the doors to the courthouse for potential litigants with otherwise legitimate claims who could not otherwise afford legal services on a "pay-as-you-go" basis.

The justification for contingent fees can be cast entirely on utilitarian

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1. "A bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered." BLACK'S LAW DICTIONARY 209 (5th ed. 1979).

2. Canon 13 of the 1908 CANONS OF PROFESSIONAL ETHICS of the American Bar Association provided:

A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.

3.

Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid.

CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 2-20 (1984 ed.).

grounds: persons who lack any other means should be able to employ the present economic value of possible future recoveries to hire a lawyer. Two other justifications are also often mentioned: the contingent fee permits persons, regardless of their poverty, to spread the risk of defeat in litigation; and the contingent fee puts the lawyer squarely on the side of the client because both will succeed or fail together. If there were a market for buying and selling causes of action, contingent fees would probably not be necessary. Injured parties could sell part of their claims in that market and use the funds to hire lawyers. But such a market is prohibited by laws that ban champertous exchanges and limit the assignability of causes of action. Banks, lacking assignable security, thus cannot justify lending funds for legal fees on the unsecured hop that a statistical likelihood of recovering will pay off the loan.<sup>4</sup>

Some flavor of the historical judicial disfavor of contingent fees is present in the case of *Kizer v. Davis*.<sup>5</sup> In that case, attorney James Kizer sued his former client, Joyce Davis to recover his fee in quantum meruit for unpaid work done on Davis' marriage dissolution case.<sup>6</sup> In order to support his fee claim, Kizer presented the trial court with records listing the number of hours he had expended in advancing the representation.<sup>7</sup> The trial court engaged in a detailed inspection of Kizer's bill before determining that it was going to deny relief.<sup>8</sup> First, Kizer did not spend as much time on the representation as he claimed to the court. In addition, Davis was pushing Kizer to hire co-counsel fairly early in the representation which should have been a signal to the lawyer that the professional relationship was in trouble.<sup>9</sup> Finally, the Ethical Considerations ("EC's") of the *Code of Professional Responsibility* indicated that Kizer should not sue his client unless it was absolutely necessary to prevent a fraud or "gross imposition" on the client and neither of those features was present in the instant case.<sup>10</sup> Kizer appealed the trial court's refusal to grant him fees and the court of appeals reversed the trial court's denial. The court acknowledged that the trial judge recognized that lawyers could recover quantum meruit and Davis wanted the court of appeals to ignore that. In addition, the EC's did not apply. In fact, there was no single case that barred the lawyer from collecting his fee.<sup>11</sup> "In determining the reasonable value of the legal services rendered," the court held, "the time expended by an attorney alone is not the controlling factor. Among

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4. C. WOLFRAM, MODERN LEGAL ETHICS 528 (1986).

5. 369 N.E.2d 439 (Ind. App. 1977).

6. *Id.* at 441.

7. *Id.*

8. *Id.* at 442.

9. *Id.*

10. *Id.* at 445. The fraud or "gross imposition" standard was formalized in Canon 13 of the CANONS OF PROFESSIONAL ETHICS (1908) and discusses the advisability (or, more accurately, the inadvisability) of suing clients to collect fees.

11. *Id.* at 443.



other things, consideration may be given to the general quality of the effort expended by the attorney.”<sup>12</sup>

*B. Historical Treatment of Contingent Fee Issues in Disciplinary Cases*

As far as disciplinary treatment for lawyers who were in contingent fee disputes, Indiana has a number of cases that should inform the astute lawyer of the major contours of this area of law. These cases almost invariably turn on some consideration of whether the lawyer's claimed fee was reasonable as required by Rule of Professional Conduct 1.5(a).<sup>13</sup> In *In re Myers*, the respondent undertook an attempt to recover funds for a group of clients based on an investment scheme gone bad.<sup>14</sup> The respondent lawyer entered into a contingent fee agreement whereby he would take ten percent of the gross amount recovered.<sup>15</sup> He negotiated a settlement whereby the opponent would pay a settlement for \$550,000. The amount was to be paid in installments beginning with a \$50,000 lump sum payment and then payments of \$15,000 per month until the balance was paid off.<sup>16</sup> The respondent took \$50,000 of his fee out of the first two payments and waived the remaining \$5000. The clients were unhappy about the lawyer taking his full fee out of the first two payments. The payment stopped after \$160,000 was paid. The respondent filed suit, but no recovery was had.<sup>17</sup>

Disciplinary action was initiated because the clients claimed the respondent had taken an unreasonable fee.<sup>18</sup> The respondent lawyer argued that the term “gross recovery” in the contingent fee contract involved the total amount settled

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12. *Id.* at 446.

13. Rule 1.5(a) of the RULES OF PROFESSIONAL CONDUCT provides:

A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2001).

14. 663 N.E.2d 771, 772 (Ind. 1996).

15. *Id.*

16. *Id.*

17. *Id.*

18. \$50,000 of the \$160,000 equals about a thirty-one percent total fee.

for.<sup>19</sup> In settling the case for a public reprimand, however, the respondent lawyer admitted that his interpretation of the term "gross recovery" was incorrect and that it referred to the amounts *actually* recovered and that the clients' interpretation of the contract was the correct one.<sup>20</sup> The supreme court reasoned that if the cost of delivering legal services was too high, the public is deterred from using the system to protect their rights.

Lawyers are obligated to act with an allegiance to the interests of their clients. Most clients must pay lawyers engaged in private practice for their services, thus creating a risk of conflicting economic interests. Lawyers almost always possess the more sophisticated understanding of fee arrangements. It is therefore appropriate to place the balance of the burden of fair dealing and the allotment of risk in the hands of the lawyer in regard to fee arrangements with clients. In this case, the respondent employed his superior position in the bargaining and settlement process to exact an inflated legal fee from his clients. However, because he ultimately relented and made restitution and because he reached an agreement for discipline with the commission, we conclude that a public reprimand is not inappropriate.<sup>21</sup>

The upshot is that the court considered the relative power positions of the parties and determined that the lawyer is almost always in a position of superior power and knowledge when compared to the client.

Some of the above analysis later appeared in 1996 when the court decided *In re Maley*.<sup>22</sup> In *Maley*, the respondent lawyer undertook a client matter involving a workers compensation claim. In the underlying matter, the lawyer negotiated with and had the client sign a contingent fee contract allowing him to collect a fee of thirty-three and one-third percent.<sup>23</sup> Apparently unbeknownst to the client, the fees in workers compensation matters are fixed by a statutory formula.<sup>24</sup> Once the Hearing Member of the Industrial Board reached his decision to award the claimant \$89,000, the respondent lawyer's fee under the statute would have \$10,500.<sup>25</sup> The lawyer, however petitioned the full board for the award of his one-third contingent under the terms of the contract with his client. Although it was within the power of the Board to grant additional fees, it did not do so.<sup>26</sup> Maley wanted to initiate an appeal of the denial of his fee award, but the client refused. Thereafter, the defendant employer issued a check to the claimant for more than \$34,000 and Maley kept \$27,000.<sup>27</sup> This was

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19. *In re Myers*, 663 N.E.2d at 773.

20. *Id.* at 773.

21. *Id.* at 774-75 (citations omitted).

22. 674 N.E.2d 544 (Ind. 1996).

23. *Id.* at 545.

24. *Id.* See IND. ADMIN. CODE tit. 631, § 1-1.24 (1996).

25. *In re Myers*, 674 N.E.2d at 546.

26. *Id.* at 545-46.

27. *Id.*



enough to find that the lawyer had taken an unreasonable fee in violation of the *Rules of Professional Conduct*. In imposing a public reprimand on the lawyer, the supreme court noted that the Workers Compensation Board could have awarded an enhanced fee, it did not do so and, therefore the lawyer's fee grab violated the rules.<sup>28</sup> Although the court found Maley's long service in the bar to be a mitigating factor, it also found there was no way that this conduct could have been a good faith, albeit erroneous belief that taking the enhanced fee was acceptable.<sup>29</sup> Were it not for the facts in mitigation, the lawyer might otherwise have been suspended.<sup>30</sup>

### *C. Recent Cases More Fully Flesh-out the Rule*

In 1997, a public reprimand was imposed on a lawyer after trial on agreed facts in the case of *In re Lehman*.<sup>31</sup> In that case, the respondent lawyer represented the plaintiff in a 1994 automobile accident case. He and the client entered into a contingent fee contract providing for the payment of one-third of any and all amounts recovered prior to the first pre-trial conference and escalating percentages thereafter.<sup>32</sup> The client eventually agreed to settle the claim for a total of \$12,000. Once expenses were totaled, the client received a check for \$4044.04 and the lawyer noted for the client that the total settlement amount was reduced by \$3710 due to a subrogation claim from State Farm Insurance and \$1188.80 for another subrogation claim by the Hod Carriers Union.<sup>33</sup> What the client didn't know was that the lawyer thereafter issued checks to the two insurers in the amounts of \$2473.33 and \$792.53, respectively.<sup>34</sup> The lawyer had reduced the subrogation payments by one-third to accommodate his fee, thereafter giving him a total compensation above that agreed to in the original written contingent fee contract.

Eventually, the Hod Carriers informed the client about the payment and that's when the inquiry began. When the disciplinary action went to trial, the Hearing Officer concluded that the lawyer's retention of a total of \$5632.94<sup>35</sup> was not an unreasonable fee and did not create a conflict of interest between the lawyer and the client.<sup>36</sup> The Indiana Supreme Court held that the written contract

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28. *Id.*

29. *Id.* at 547.

30. *Id.* The Indiana Supreme Court determined that the lawyer's long practice experience was a mitigating fact. Under the ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (1991), Standard 9.22(i), substantial experience in the practice of law is considered an aggravating factor when determining sanction.

31. 690 N.E.2d 696 (Ind. 1997).

32. *Id.* at 698.

33. *Id.* at 699.

34. *Id.*

35. That amount calculates out to approximately a 46.9% contingent fee.

36. *In re Lehman*, 690 N.E.2d at 701.

controls.<sup>37</sup>

The lawyer's conduct was clearly improper in their view: the settlement statement indicated the lawyer got \$4000, but he kept \$5632.94 and twice he failed to disclose the total amount of his retention to his client.<sup>38</sup> Relying on *Myers* and *Maley*, discussed above, the court reiterated the analysis that where the written contingent fee contract calls for a specific fee, any amount retained by the lawyer in excess of that amount is strongly indicative of an unreasonable fee.<sup>39</sup> Here, they found he had, in fact, exacted an unreasonable fee in violation of Rule of Professional Conduct 1.5(a).<sup>40</sup> Although the lawyer argued that the total of payments from defendants was over \$16,000, the court held that there was no settlement in excess of \$12,000 and the lawyer's arguments to the contrary were without merit.

The lawyer also argued that the negotiation of a contingent fee with a client did not constitute a conflict of interest, but the supreme court noted that there was room for debate on the issue.<sup>41</sup> In this case, they held, the issue was foreclosed because the lawyer did not make the appropriate disclosures to the clients.<sup>42</sup> Therefore, his self-interest in this case affected the client adversely. Although the court imposed a public reprimand on the lawyer, the Chief Justice dissented from the sanction and would have suspended him from the practice of law.<sup>43</sup>

In 1999, the Indiana Supreme Court spent a considerable amount of its attention to addressing contingent fee issues in two cases: *Galanis v. Lyons & Truitt*<sup>44</sup> and *In re Benjamin*.<sup>45</sup> In *Galanis* ("Galanis I"), the contingent fee issue involved a recurring problem for cases in this area: what do the parties do when the fee agreement is silent?

The client, Brown was injured in an automobile accident in 1988. She was originally represented by Truitt, one of the partners in the law firm.<sup>46</sup> Truitt was appointed to a judgeship in 1993, and Brown needed to find a new lawyer. She hired Galanis to represent her. Galanis' contingent fee agreement with Brown called for a fee of forty percent of any recovery if the case was settled or taken to trial.<sup>47</sup> If an appeal ensued, then an additional ten percent of the recovery would be due to Galanis. In the contingent fee agreement between Brown and Galanis, there was no mention of any fee payments to the prior law firm, Lyons & Truitt, but Galanis knew that the contingent fee agreement Brown had with

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37. *Id.*

38. *Id.*

39. *Id.* at 702.

40. *Id.*

41. *Id.* at 704.

42. *Id.*

43. *Id.*

44. 715 N.E.2d 858 (Ind. 1999) [hereinafter *Galanis I*].

45. 718 N.E.2d 1111 (Ind. 1999).

46. *Galanis I*, 715 N.E.2d 858 at 860.

47. *Id.*



them called for the law firm to receive one-third of any recovery.<sup>48</sup> Four months after undertaking Brown's representation, Galanis took the case to jury trial and Brown received a verdict for \$250,000. Thereafter, the defendants offered to settle the case for \$200,000 on the promise of avoiding an appeal and Brown accepted the offer.

Shortly thereafter, Lyons sent a list of the hours and expenses that Lyons & Truitt had in Brown's case but did not make a formal demand for a specific amount of compensation.<sup>49</sup> Galanis responded with an offer to resolve their fee claim for \$4000. Lyons, for the first time, asked for one-third of one-third of the recovery, or \$22,221.98 as settlement for their fee claim.<sup>50</sup> Galanis rejected this offer (as the court would later confirm) as excessive.

Lyons filed a declaratory judgment action against both Brown and Galanis. Brown cross-claimed against Galanis claiming that he was responsible for paying Lyons & Truitt *if anyone was* responsible for paying them. The trial court held that Lyons was entitled to a reasonable fee, commensurate with a reasonable hourly rate multiplied by the number of hours they had in the case.<sup>51</sup> Both sides appealed. Galanis did so because he didn't think he should be responsible for the fee and Lyons complained about the valuation of the firm's services. The Indiana Court of Appeals affirmed the trial court.<sup>52</sup>

The Indiana Supreme Court accepted transfer and reaffirmed that the discharged lawyer has the right to recover the reasonable value of their service in accordance with the principle of quantum meruit and may not recover the full amount provided for under their original fee contract with the client.<sup>53</sup> The court held that even if the agreement with the client calls for a full contingent after the firm is discharged, it is *likely* to be unenforceable.<sup>54</sup> A full contingent fee to the successor lawyer, however, might be unreasonable as well. The successor lawyer must not be allowed to take a windfall at the expense of predecessor counsel. The use of quantum meruit prevents this kind of unjust enrichment.<sup>55</sup> The value conferred on the client is not always equal to the hourly rate times the number of hours worked. It stands to reason that, depending on the case, the mechanical application of this formula can likely over- or under-compensate the terminated

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48. *Id.*

49. *Id.*

50. No one disputes that terminated lawyers are entitled to a fee for the reasonable value of the services they provided to the client, even though the professional relationship ended before any recovery was made. For many years, the payment due to prior or referring counsel was set by custom and practice at, "a third of a third." Aside from a certain literary symmetry, there is no law in Indiana to support this "measure" of compensation under the Indiana Code or the Indiana Rules of Professional Conduct.

51. *Galanis I*, 715 N.E.2d at 860.

52. *Id.*

53. *Id.* at 861.

54. *Id.*

55. *Id.*

lawyer.<sup>56</sup> Consideration must be given to the quality of the effort expended by the terminated lawyer on behalf of the client.<sup>57</sup> For making this determination in the future, the court set the presumptive yardstick as a measurement at the relative amount of time charges, adjusted for any unproductive or unnecessary effort by either the predecessor or successor counsel.<sup>58</sup> The thinking, of course, being that a straight consideration of the hours multiplied by the hourly rate would, in many cases, be a very inaccurate measurement of the appropriate fee.<sup>59</sup>

The court was also mindful of another issue associated with this problem: who pays the predecessor's fee? Borrowing the analysis from the Louisiana case of *Saucier v. Hayes Dairy Products*<sup>60</sup> the court concluded that only one contingency fee should be paid by the client and that fee should be allocated between and among the various lawyers involved in the claim.<sup>61</sup> Hence, *Galanis I* identified and resolved two important issues that arise in the silence of the contingency fee agreement with the client: (1) what is the appropriate measure of the fees to be allocated to predecessor counsel under the quantum meruit analysis; and (2) who is responsible for making that allocation. There was another issue associated with this case that the court did not resolve in *Galanis I*. That issue would be addressed in a subsequent decision.

Later that year, the court identified, but did not specifically resolve an issue in contingent fee contracts associated with medical malpractice representations. In *In re Benjamin*, the client was suing the Fort Wayne hospital where her husband died.<sup>62</sup> She entered into a contingent fee contract with a first lawyer who was not the respondent in this disciplinary action. In this fee contract, the first lawyer would receive forty percent of the total recovery with the total fee not to exceed \$200,000.<sup>63</sup> After this fee was created, the first lawyer and Benjamin became law partners. After their partnership ended, Benjamin got the files from the other lawyer including the medical malpractice case as issue here. In the summer of 1995, a settlement was reached with the health care provider for \$100,000 which was sufficient to allow the client to petition for an additional recovery from the Patient's Compensation Fund.<sup>64</sup>

A year later, Benjamin and the client received a settlement for \$335,000 from the Fund. For his fee, Benjamin kept \$40,000 from the provider's share and an

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56. *Id.* at 862.

57. *Id.* (citing *Kizer v. Davis*, 369 N.E.2d 439, 441 (Ind. App. 1977)).

58. *Id.*

59. *Id.*

60. 373 So. 2d 102 (La. 1979).

61. *Galanis I*, 715 N.E.2d 858 at 863.

62. 718 N.E.2d 1111, 1112 (Ind. 1999).

63. *Id.*

64. *Id.* The initial \$100,000 payment is referred to as the "provider's" share or the limit of the health care provider's required liability coverage. Once the provider agrees to pay that sum over to a claimant, the patient is eligible to press their claim against the Patient Compensation Fund maintained by the Indiana Department of Insurance. That portion of the recovery is referred to as the "fund" portion.



additional \$83,750 from the Fund portion of the settlement.<sup>65</sup> Attorney fees from the fund portion of medical malpractice recoveries, however, are fixed by statute. Under the statute, his fees from the fund should have amounted to \$50,250 or fifteen percent of the recovery. That brought Benjamin's total fee to \$134,000.<sup>66</sup> The client challenged Benjamin on his retained fees and argued that he should only have kept forty percent of the first \$100,000 and an additional fifteen percent of the fund portion. Benjamin asked his former partner what he contemplated as a fee under the contract and that lawyer indicated that he intended to take forty percent of any recovery up to \$100,000.<sup>67</sup> If the recovery was in excess of the provider's share and a substantial recovery was had from the fund, then he intended to keep all of the provider's share (\$100,000) and fifteen percent of the fund portion.<sup>68</sup>

In essence the former partner intended to have two fee agreements: one if settled with the provider and another if settled through the fund. Using the former partner's intended, but unwritten, fee agreement, Benjamin would have kept one hundred percent of the provider's share and fifteen percent of fund portion of the settlement for a total fee of \$150,250.<sup>69</sup> Because Benjamin had kept a total of \$174,000, he offered to return \$23,750 to the client. The client rejected that solution and filed a declaratory judgment action to resolve the issue on which the contingent fee agreement was silent.<sup>70</sup>

In its opinion in the disciplinary action, the Indiana Supreme Court reiterated its holding from *Maley* in which it held that any fee greater than that permitted under the statutory fee formula indicated unreasonableness. In a footnote, however, the court noted that keeping all of the provider's share plus fifteen percent of the fund portion of the settlement appeared to be an attempt to circumvent the fee calculation in the medical malpractice statute.<sup>71</sup> Without announcing a specific fee formula for resolving conflicts like this in the future, the court left the very strong impression that it viewed lawyer conduct like that in this case to be an attempt to circumvent the statute: "We note, in any event, that an attorney's written disclosure to the client of the fee and the method by which it is to be determined is of key importance in avoiding disputes over the reasonableness of the fee."<sup>72</sup> Thereafter the court found the lawyer's conduct to violate Rule of Professional Conduct 1.5(a) and imposed a public reprimand on him. The sanction might have been significantly more severe, however, had the court not found a number of mitigating factors in evaluating this case.<sup>73</sup> The lawyer had been cooperative, worked out a payback with his client and had no

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 1113 n.2.

72. *Id.*

73. *Id.* at 1114.

prior history of disciplinary action.<sup>74</sup>

In 2001, the Indiana Supreme Court revisited the conduct of attorney Michael Galanis in the disciplinary action in *In re Galanis* ("Galanis II").<sup>75</sup> Like the case discussed above, this disciplinary action centered on his representation of Mrs. Brown, the plaintiff in a civil action for whom he obtained a \$250,000 jury verdict.<sup>76</sup> The case was subsequently settled for \$200,000 in order to avoid an appeal. Galanis kept half the proceeds of the settlement or \$20,000 more than agreed.<sup>77</sup> The defendant in the underlying case was declared incompetent and a guardian was appointed to manage her affairs. In the civil action, the defendant filed a motion to correct errors in the trial court because the verdict had been for \$100,000 more than the defendant's insurance coverage. Galanis, who represented the plaintiff, investigated the matter to see whether the defendant had a claim against her insurer for acting in bad faith. Galanis then set to work with the defendant's lawyer in an attempt to work out an arrangement whereby the defendant would assign her bad faith claim against her own insurer to the plaintiff.<sup>78</sup>

Eventually, Galanis and the lawyer worked out the \$200,000 settlement that finally resolved the case. When the plaintiff went to the lawyer's office for the disbursement of the settlement proceeds, she noticed that she only received half the settlement due to Galanis' retention of fifty percent of the total recovery.<sup>79</sup> When she protested, Galanis explained that he had more than eighty hours invested in the investigation of the bad faith claim against the defendant's insurer and, when calculated with his regular billing rate, he expended about \$20,000 worth of effort on her behalf.<sup>80</sup> There was no writing that explained this reasoning associated with the disbursement statement to the client.<sup>81</sup> In the disciplinary action associated with his acts, the supreme court held that Galanis had violated Rule of Professional Conduct 1.5(a) by taking an unreasonable fee in excess of his fee agreement with the client.<sup>82</sup> There was nothing to indicate that Galanis and the client ever had any sort of meeting of the minds over the fee overage. The court recognized the Galanis and his client only negotiated one fee deal.<sup>83</sup>

It was also significant that the bad faith claim belonged to the defendant and negotiations had not produced an assignment of that claim to the plaintiff. In light of the substantial amount of the unreasonable fee retained by the respondent, the supreme court determined that a significant period of suspension

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74. *Id.* at 1115.

75. 744 N.E.2d 423 (Ind. 2001) [hereinafter *Galanis II*].

76. *Id.* at 423-24.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. For the text of Indiana Professional Conduct Rule 1.5(a), see *supra* note 13.

83. *Galanis II*, 744 N.E.2d at 424.



was warranted. The court imposed a ninety-day suspension from the practice of law on this lawyer.<sup>84</sup>

*D. Important Developments During the Survey Period*

The Indiana Supreme Court has very recently revisited the topic of lawyers who take fees in excess of those agreed to in the contingent fee agreement with the client. In *In re Hailey*, the respondent lawyer represented a young plaintiff and his family who were involved in an automobile accident.<sup>85</sup>

The client was thirteen years old at the time of the auto accident in 1992 and was very seriously injured.<sup>86</sup> The family did not know which lawyer to hire so they called an uncle who was a lawyer in Alabama. The uncle did not do personal injury work as part of his practice and telephoned another lawyer in Alabama whom he knew to do such work.<sup>87</sup> That lawyer obtained the respondent's name for the family and communicated with the respondent that he was referring the case to him.<sup>88</sup> In January 1993, the respondent and his clients entered in a contingent fee agreement that provided that if the case was settled or tried after one hundred eighty days suit was filed, then the client would pay forty percent of the "gross amount recovered" with expenses to be borne by the client as well.<sup>89</sup> No provision in the fee agreement was made for the eventually of a structured settlement with future periodic payments to the client.

In November 1993, suit was filed against the driver of the car in which the plaintiff was riding, the car's owner, the car's manufacturer and others. The plaintiff's father maintained contact between the respondent lawyer and the Alabama uncle about the case, but the mother and the client were unaware of such contacts.<sup>90</sup> In November 1997, the respondent and various insurers met in two mediation sessions. The respondent lawyer knew that a structured settlement was likely at this point. The plaintiffs were concerned that in the event that the structured settlement consisted of a lump sum payment plus an annuity for the future periodic payments, those amounts would be consumed by the respondent's fees and expenses.<sup>91</sup>

Eventually, they realized that they could not effectively evaluate the defendant's proposed settlement offers unless they knew with some degree of certainty what the fees for the respondent's services were going to be. It was their desire to leave the annuity alone for future expenses and, in order to completely evaluate the proposed settlement, they needed to know what the

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84. *Id.* at 425.

85. 792 N.E.2d 851, 853 (Ind. 2003).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 854.

90. *Id.*

91. *Id.*

respondent's fee claim was going to be.<sup>92</sup>

At this point the respondent discussed for the first time what he believed his fees would be for the representation and about the various methods of its calculation. He proposed taking forty percent of the lump sum cash payment plus forty percent of the gross amount of future guaranteed payments, undiscounted to present value.<sup>93</sup> The plaintiff's father figured out that between the attorney fees, the expert witness fees and related expenses, that the lump sum would be insufficient to cover all their obligations and that they would still owe attorney fees beyond that amount. The respondent lawyer ultimately agreed in writing to cap his fees at a total of \$1.6 million.<sup>94</sup> Both parties later agreed that this was to be a maximum amount and not a settlement of the fee claim. Armed with this information, the plaintiffs agreed to the settlement. The terms included a lump sum payment of about \$2 million and then period future payments that would provide \$80,000 per year for the longer of forty years or the plaintiff's life.<sup>95</sup>

Unbeknownst to the plaintiff and his family, the respondent lawyer had worked out a deal with the Alabama personal injury lawyer. When the lump sum came in, the respondent lawyer put the money in his trust account.<sup>96</sup> He and the Alabama lawyer had previously agreed that the respondent lawyer would provide him with one-third of his fee. He thereafter wrote trust account checks to himself for \$1.07 million and one to the Alabama lawyer for \$533,343 for a total of \$1.6 million.<sup>97</sup> There was no notification to the plaintiff and the clients were not given copies of the confirmatory letters.<sup>98</sup> Other expense withdrawals were made on the client's behalf and no notice was likewise given to the clients or an accounting. Over time, the plaintiff's mother became convinced that the respondent was not paying the creditors because they were contacting her directly.<sup>99</sup>

Eventually, the supreme court held that the respondent took an unreasonable fee in violation of Rule of Professional Conduct 1.5(a).<sup>100</sup> The fee taken, \$1.6 million dollars, was in excess of the forty percent agreed to in the contingent fee contract when accounting is made for the time value of money. By taking his entire fee at the outset of the structured settlement, the respondent realized his entire fee, leaving any risk of loss completely on his client.<sup>101</sup> This was the problem for the lawyer in *In re Myers*.<sup>102</sup> In the end, the court found the

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92. *Id.*

93. *Id.*

94. *Id.* at 855.

95. *Id.*

96. *Id.*

97. The Alabama lawyer subsequently paid one-third of his "third" to the Alabama uncle attorney.

98. *In re Hailey*, 792 N.E.2d at 856.

99. *Id.*

100. *Id.* at 859.

101. *Id.*

102. 663 N.E.2d 771, 774 (Ind. 1996).



respondent lawyer engaged in misconduct in a number of ways including retaining a fee from the settlement in excess of the amount justified by the percent provided in his written fee agreement and thereby taking an unreasonable fee, failing to give his clients a written disbursement statement, he delayed payments to medical and third party creditors, and he engaged in forbidden fee sharing with the Alabama lawyer which occurred without the knowledge or consent of his clients.<sup>103</sup> Based on strong mitigating factors, the lawyer received only a public reprimand for his misconduct.<sup>104</sup> One justice dissented and believed the respondent lawyer's misconduct so serious in this matter that he would have had the court impose a period of suspension.<sup>105</sup>

A very important case was decided on issues of longstanding concern. In *In re Kendall*,<sup>106</sup> the Indiana Supreme Court was presented with two issues that were previously unaddressed in the law governing lawyers in Indiana. First, the court held that advance payment of legal fees must be held in the lawyer's trust account until it can fairly be deemed to be earned. Second, lawyers are certainly free to take fixed or flat fees for their representations, but such fees cannot be considered to be totally nonrefundable.<sup>107</sup>

In *Kendall*, the respondent lawyer had required clients to pay attorney's fees in advance as well as sign a contract that referred to the fees as "nonrefundable."<sup>108</sup> Those fees were not deposited in the firm's trust account, but rather, in the firm's operating account where they were drawn down on immediately and otherwise treated as earned fees.<sup>109</sup> The respondent lawyer stated that it was his intention to refund those fees to any client who terminated the representation despite the fact that he had identified them to the client as nonrefundable in the employment contract.<sup>110</sup>

After the law firm filed bankruptcy, the Internal Revenue Service put a lien on all the assets and the lawyer was unable to refund any money to his clients.<sup>111</sup> Their complaints resulted in disciplinary action in which Kendall was charged with violations that included, inter alia, Rules of Professional Conduct 1.5(a),<sup>112</sup> 1.15(a),<sup>113</sup> 1.15(b)<sup>114</sup> and 1.16(d)<sup>115</sup> based on his handling of the money received

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103. *In re Hailey*, 792 N.E.2d at 861.

104. *Id.* at 864.

105. *Id.* at 865 (Sullivan, J., dissenting).

106. 804 N.E.2d 1152 (Ind. 2004).

107. *Id.* at 1160.

108. *Id.* at 1153.

109. *Id.*

110. *Id.*

111. *Id.* at 1160.

112. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2001). This provision requires that a lawyer fee shall be reasonable and the rule lists a number of factors used to judge the reasonableness of the fee.

113. MODEL RULES OF PROF'L CONDUCT R. 1.15(a) (2001). This provision requires a lawyer to keep money or other property that belongs to others separate from the lawyer's own property. Hence, the development of trust accounts and the rules associated with their operation for this

from clients. Although the Hearing Officer that heard the disciplinary action did not agree that the Commission proved the most serious charges,<sup>116</sup> the supreme court found that such was the case.<sup>117</sup> Although the court found the misconduct to be serious, they gave great weight to the "highly respected witnesses" who spoke on the respondent lawyer's behalf and imposed a public reprimand as a sanction.<sup>118</sup>

Among the very significant holdings in the case, the court reasoned that what lawyers call their fees does not drive the analysis. The key feature of how they look at fees is the actual nature of the attorney-client relationship.<sup>119</sup> The fact that the lawyer named his fee nonrefundable made it an unreasonable fee under Rule of Professional Conduct 1.5(a). Because Rule 1.16(d) requires a terminated lawyer to refund the unearned portion of the fee means that advance payment of fees for future legal services can never be nonrefundable. It flows from that reasoning; therefore, that the fees paid must be retained in the lawyer's trust account until such time as the lawyer earns part or all of the money paid. At that point, the money can fairly be removed from trust and be treated as the lawyer's own money. One important feature of the case, however, is the court's reaffirmation that the use of a fixed or flat fee is still an appropriate way to charge for legal services in many situations.<sup>120</sup>

## II. THE INDIANA BUSINESS COUNSEL LICENSE

Indiana now has a regulatory scheme permitting some non-Indiana lawyers to obtain an Indiana license to practice where they are corporate counsel.<sup>121</sup> The new rule creating the Indiana Business Counsel License (IBCL) adds to the state's scheme granting provisional license to lawyers licensed elsewhere who wish to become admitted here. The Indiana Board of Law Examiners was regularly faced with applications for admission to the Indiana bar from lawyers admitted in other jurisdictions but had been living in Indiana and representing a business entity. The Board of Law Examiners was powerless to give credit to those lawyers despite years of practice experience successfully representing

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purpose.

114. MODEL RULES OF PROF'L CONDUCT R. 1.15(b) (2001). This rule requires a lawyer to deliver the funds kept in trust to their proper owner promptly and to render a full accounting when requested to do so.

115. MODEL RULES OF PROF'L CONDUCT R. 1.16(d) (2001). Upon the termination of the representation, the lawyer had an affirmative duty to turn over papers, property and money belonging to the client or any third person to its owner.

116. *In re Kendall*, 804 N.E.2d 1152 at 1154.

117. *Id.* at 1158.

118. *Id.* at 1161.

119. *Id.* at 1160.

120. *Id.*

121. IND. ADMISSION & DISCIPLINE R. 6, § 2 (2003).



Indiana businesses.<sup>122</sup> Effective January 1, 2004, those lawyers have an opportunity to join the Indiana bar on a new path through the IBCL.

Among the requirements for licensure, the applying lawyer must be employed full-time as in-house counsel for a business.<sup>123</sup> The business of the business at which the applying lawyer is employed cannot be the practice of law.<sup>124</sup> The rule also requires that the applicant's sole source of income for legal services be the applicant's employment at the business entity where he or she is a full-time employee.<sup>125</sup> The applicant must also be in good standing in the jurisdiction in which they are admitted<sup>126</sup> and meet the character and fitness criteria of the Indiana bar.<sup>127</sup> Requirements also include those things that are required for those otherwise admitted to the Indiana bar including graduation from an ABA accredited law school.<sup>128</sup> Applicants for the IBCL must also not have failed the Indiana bar examination within the last five years.<sup>129</sup> The IBCL is not intended to provide a mechanism for bypassing the other rules for admission for the bar.

The IBCL can be renewed for up to five years.<sup>130</sup> The process is not dead-end, however, as there is a provision for converting the IBCL into a Provisional License.<sup>131</sup> The Provisional License is an existing route to licensure to attorneys not otherwise admitted in Indiana to develop the right to practice here. The benefit of the IBCL is that the years in service to the business entity apply toward the years-in-practice requirement for the Provisional License.<sup>132</sup> If the attorney remains in practice for the Indiana business for five years, at the end of that time, the lawyer can apply for a Provisional License in order to practice for his employer.<sup>133</sup> If the lawyer fails to apply for a Provisional License within seven years after he or she has received an IBCL, then the attorney is no longer eligible for either the Provisional License or the Business Counsel License.<sup>134</sup> One specific requirement of note is that the lawyer granted the IBCL must attend an annual Indiana law update continuing legal education forum and obtain a minimum of twelve hours of continuing education during the first twelve months after receiving the license.<sup>135</sup>

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122. C. Gilliard, *New Indiana Business Counsel License*, RES GESTAE, Jan. 2004.

123. ADMIS. DISC. R. 6, § 2(a) (2004).

124. *Id.*

125. *Id.*

126. *Id.* § 2(b).

127. *Id.* § 2(d).

128. *Id.* § 2(g).

129. *Id.* § 2(f).

130. *Id.* § 4.

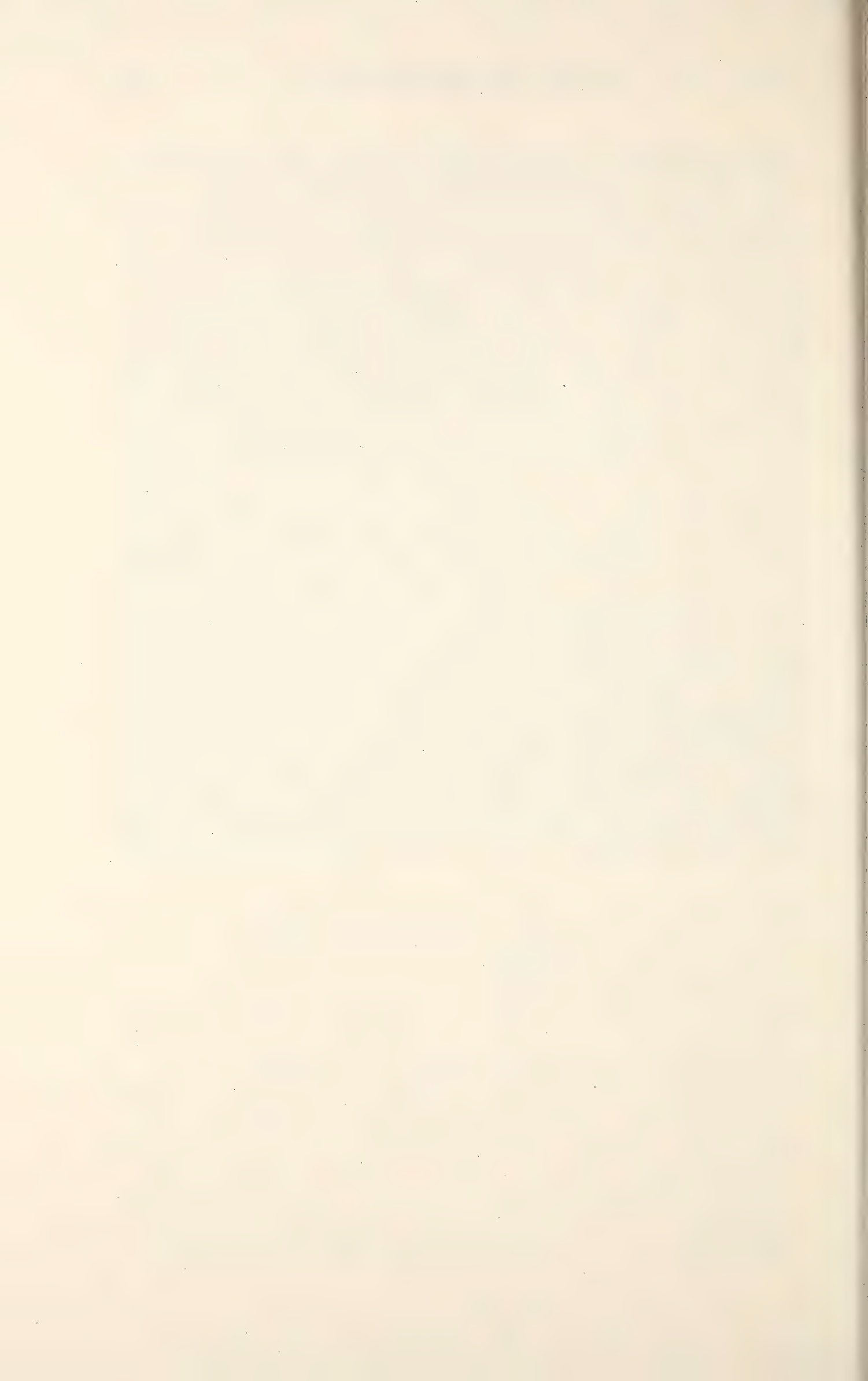
131. *Id.* § 1.

132. *Id.* § 4.

133. *Id.*

134. *Id.* § 2.

135. *Id.* § 5.





# **“WE JUST SAW IT FROM A DIFFERENT POINT OF VIEW”: RECENT DEVELOPMENTS IN INDIANA REAL PROPERTY LAW**

TANYA D. MARSH\*

This Article takes a topical approach to the notable real property cases in this survey period, October 1, 2002 through September 30, 2003, beginning with a discussion of the unresolved tension in Indiana law between legal and equitable remedies for the breach of a contract concerning real estate. The Article then analyzes noteworthy cases in each of the following areas: (1) relationships between private parties; (2) title and recording issues; (3) land use law; (4) eminent domain law; (5) tax sales; and (6) developments in the common law of property.

## **I. REMEDIES FOR THE BREACH OF A REAL ESTATE PURCHASE CONTRACT**

The same panel of the Indiana Court of Appeals addressed a fundamental question twice in as many months this survey period—what remedies are available to a seller after a purchaser’s breach of a contract for the sale of real estate? Beyond their direct application, these cases are important because the contradictory philosophies articulated in *Humphries v. Ables*<sup>1</sup> and *Kesler v. Marshall*<sup>2</sup> highlight a broad unresolved tension in Indiana common law between legal and equitable remedies, specifically with respect to the availability of the remedy of specific performance for the breach of a real estate contract.

The first case addressed a dispute between Max and Betty Ables (collectively, “Sellers”) and Marc and Kelle Humphries (collectively, “Buyers”), who were parties to a contract for the sale of a liquor store on a site in Frankton, Indiana, that had been previously used as a gas station (the “Property”). The on-site underground storage tanks, unused since the early 1970s, had never been removed.<sup>3</sup> Buyers informed Sellers that they would not consummate the transaction, and Sellers filed suit. Buyers counterclaimed, arguing that the Sellers had made fraudulent misrepresentations regarding the environmental condition of the Property, particularly with respect to the underground storage tanks. The trial court found in favor of Sellers and ordered specific performance of the contract and awarded incidental damages.<sup>4</sup> Buyers appealed, claiming that the presence of the tanks and the possible contamination of the Property rendered the title thereto “unmarketable,” and that, therefore, they had no obligation to fulfill the contract.<sup>5</sup> In any event, Buyers asserted, Sellers had an adequate

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1. 789 N.E.2d 1025 (Ind. Ct. App. 2003).

2. 792 N.E.2d 893 (Ind. Ct. App. 2003).

3. *Humphries*, 789 N.E.2d at 1028.

4. *Id.* at 1029.

5. *Id.* at 1032. On the marketable title issue, the court of appeals held that potential or



remedy at law and specific performance was not the proper remedy.

Judge Sullivan, writing for the majority, began by setting forth his judicial philosophy about the availability of the equitable remedy. In part, the majority noted that the decision to grant specific performance is within the discretion of the trial court and that such judgments of the trial court are to be given deference because specific performance is a remedy that "sounds in equity."<sup>6</sup> The court also noted that "[i]t is a matter of course for the trial court to grant specific performance of a valid contract for the sale of real estate."<sup>7</sup> The court specifically rejected the Buyers' view that, under Indiana law, "specific performance is available [for the non-breaching seller] only when re-sale or foreclosure of the property is made difficult or impossible due to damage or loss."<sup>8</sup> Instead, the court found that the remedies provision of the contract provided that all remedies, legal and equitable, were available to the non-breaching party and that contracts, when entered into freely and voluntarily, will be enforced by the courts.<sup>9</sup> "Because the Buyers have made no claim that they did not enter into the contract freely and voluntarily, we will not invalidate a remedy for which the Sellers contracted."<sup>10</sup> Based on this analysis, the court found that the decision to award the equitable remedy of specific performance was within the trial court's discretion.<sup>11</sup>

Judge Kirsch dissented with regard to the majority's analysis of the specific performance issue, simply noting that:

I believe that specific performance of a real estate contract is proper only where the remedy at law is inadequate. While specific performance may be granted as a matter of course to the purchaser because real estate is unique, in the typical case the seller's remedy at law in the form of an action for money damages will be sufficient to fully compensate the plaintiff. I see nothing in the facts of this case to indicate that the sellers have an inadequate remedy at law to justify the grant of specific performance.<sup>12</sup>

In the opinion and dissent, Judge Sullivan and Judge Kirsch articulate the two major schools of thought regarding the availability of equitable remedies. In Judge Sullivan's view, the choice of remedies between those freely contracted by the parties is within the discretion of the trial court. In Judge Kirsch's view,

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certain environmental contamination does not render title to property "unmarketable," citing a New Hampshire Supreme Court decision which noted that "[o]ne can hold perfect title to land that is valueless; one can have marketable title to land while the land itself is unmarketable." *Id.* (quoting *McManus v. Rosewood Realty Trust*, 719 A.2d 600, 601 (N.H. 1998)).

6. *Id.* at 1034.

7. *Id.* (citing *Stoll v. Grimm*, 681 N.E.2d 749, 756 (Ind. Ct. App. 1997)).

8. *Id.* at 1035.

9. *Id.* at 1035-36.

10. *Id.* at 1036.

11. *Id.*

12. *Id.* at 1036-37.



regardless of the bargain between the parties, the trial court may only award equitable remedies, in this case specific performance, if its findings support the conclusion that no adequate remedy at law is available. This philosophical dispute has a long history in Anglo-American law and has quietly remained an unresolved background issue in modern Indiana common law.

The roots of the contemporary conflict between law and equity can be traced to the Magna Carta, which provided that appeals to justice should no longer be the business of the king alone.<sup>13</sup> Courts of common pleas began to develop what came down to us as the common law, which they applied rigidly. Only monetary damages were available from the courts of common pleas in a civil action. At the same time, the crown retained its inherent authority to decide cases and grant relief to parties in civil matters.<sup>14</sup> The chancellor presided over pleas for royal discretion, which he decided with reference to principles of fairness and morality rather than precedent and inflexible codes. The chancellor employed a number of remedies unavailable in the courts of common pleas, such as specific performance and injunctive relief.<sup>15</sup>

Eventually, the courts of chancery developed to perform the chancellor's function, and the common law courts and chancery courts operated separately to enforce different and complementary substantive and procedural rights. During the Tudor and Stuart revolutions of the sixteenth and seventeenth centuries, the crown and the lay judges of the common law courts engaged in a power struggle over the jurisdiction of the two competing systems. Ultimately, "the common law judges won the battle."<sup>16</sup> As a result, individuals could not seek relief from the court of chancery "without first alleging that law was inadequate."<sup>17</sup>

As a general rule, it is clear that law continues to dominate over equity in our merged system. The Indiana Supreme Court has recently stated in no uncertain terms that if an adequate remedy at law exists, equitable relief should not be granted.<sup>18</sup> However, for more than fifty years this default rule has not been followed in the context of real estate disputes, particularly when the plaintiff is a non-breaching purchaser seeking specific performance of a real estate purchase contract.

Although Judge Sullivan's holding is consistent with the current prevailing philosophy, Judge Kirsch's dissent in *Humphries* echoes older Indiana cases. Such cases speak of requiring a finding that no adequate remedy at law exists before upholding a trial court's grant of specific performance for the breach of a real estate purchase agreement, even when the non-breaching party was the purchaser.<sup>19</sup> But for Judge Kirsch's apparent fidelity to it, that historically

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13. Judy Beckner Sloan, *Quantum Meruit: Residual Equity in Law*, 42 DEPAUL L. REV. 399, 404 (1992).

14. *Id.*

15. *Id.*

16. *Id.* at 406.

17. *Id.*

18. *Ind. Family & Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 162 (Ind. 2002).

19. *See, e.g., Ind. Union Traction Co. v. Seisler*, 106 N.E. 911, 912 (Ind. App. 1914).



fleeting requirement has been supplanted in the past half century or so by the routine acknowledgment that specific performance is the preferred remedy for the breach of a real estate purchase agreement. Indeed, the Indiana appellate courts have repeatedly characterized specific performance as a "matter of course" in such cases.<sup>20</sup> They have explained that "[t]his is so because each piece of real estate is considered unique, without an exact counterpart anywhere else in the world."<sup>21</sup>

If this historic dichotomy had surfaced in *Humphries* and then slipped off the radar, it would have remained simply an interesting academic debate. Yet things got murkier when, not quite two months after *Humphries* was decided, the same panel of judges: Sullivan, Sharpnack, and Kirsch addressed another case in which a trial court awarded specific performance as a remedy to a seller after it concluded that a purchaser had breached a contract for the sale of real estate. Because the opinion of the majority was written by Judge Kirsch this time, the prevailing philosophy in *Kesler v. Marshall*<sup>22</sup> sharply differed from *Humphries*.

In *Kesler*, J. John Marshall ("Seller") and Kenneth J. Kesler ("Buyer") entered into a contract for the sale of real property in Elkhart, Indiana (the "Property"). Because of a dispute over the zoning status of the Property, the parties did not consummate the transaction.<sup>23</sup> Six years after the date of the contract, Seller brought an action demanding specific performance and incidental damages.<sup>24</sup> The trial court found that Buyer breached the contract and awarded specific performance and incidental damages. Buyer appealed, both on the underlying question of whether he breached the contract and on the trial court's selection of remedies.<sup>25</sup>

Judge Kirsch, writing for the majority, concluded that because Seller did not provide Buyer with certain assurances regarding the zoning of the property, Seller failed to substantially perform his obligations under the contract.<sup>26</sup> Under Indiana law, "[a] party seeking specific performance of a real estate contract must prove that he has substantially performed his contract obligations or offered to do so."<sup>27</sup> Thus, the court held, "we find the trial court's conclusion that [Seller]

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20. See, e.g., *Ruder v. Ohio Valley Wholesale, Inc.*, 736 N.E.2d 776, 779 (Ind. Ct. App. 2000) ("Specific performance is a matter of course when it involves contracts to purchase real estate.").

21. *New Life Cmty. Church of God v. Adomatis*, 672 N.E.2d 433, 438 (Ind. Ct. App. 1996).

22. 792 N.E.2d 893 (Ind. Ct. App. 2003).

23. *Id.* at 895. A condition precedent to Buyer's obligations under the contract was the that Seller "provide, in writing, that the property can be used for any manor [sic] under M-1 zoning regulations, prior to closing." *Id.* Seller provided Buyer with a letter from the Director of the Planning and Development Department of the City of Elkhart, which was intended to fulfill the requirement. *Id.* However, evidence presented at trial demonstrated that the Property "enjoyed M-1 zoning only by virtue of its 'grandfathered' status as a nonconforming use." *Id.* at 896.

24. *Id.* at 895.

25. *Id.*

26. *Id.* at 896.

27. *Id.*



was entitled to specific performance to be clearly erroneous.”<sup>28</sup>

After the court held that the Seller was not entitled to any remedy, it analyzed, in dicta, the trial court’s decision to grant specific performance to Seller. The court noted, as it had in *Humphries*, that the decision whether to grant specific performance is a matter within the discretion of the trial court.<sup>29</sup> However, it cited recent authority that “[s]uch judicial discretion is not arbitrary, but is governed by and must conform to the well-settled rules of equity.”<sup>30</sup> Those “well-settled rules” include the notions that equitable remedies like specific performance are “extraordinary” remedies and that they are “not available as a matter of right.”<sup>31</sup> Instead, equitable remedies are only available when no adequate remedy at law, i.e., monetary damages, exists. “Where substantial justice can be accomplished by following the law, and the parties’ actions are clearly governed by rules of law, equity follows the law.”<sup>32</sup>

In this case, the court found, the trial court’s findings did not support the conclusion that no adequate remedy at law existed.<sup>33</sup> “Under these circumstances, the trial court abused its discretion in ordering [Buyer] to specifically perform the contract.”<sup>34</sup> The court did not address what remedy provisions, if any, were present in the contract between Buyer and Seller.

Although Judge Sullivan agreed with the majority’s decision that Seller was not entitled to a remedy because Seller did not substantially perform his obligations under the contract, he concurred in result with a separate opinion in order to reaffirm the philosophy he expressed in *Humphries*.<sup>35</sup> His concurrence simply cited a passage from a 1906 Indiana Supreme Court decision that reads as follows:

“The equitable doctrine is that the enforcement of contracts must be mutual, and, the vendee being entitled to specific performance, his vendor must likewise be permitted in equity to compel the acceptance of his deed and the payment of the stipulated consideration. This remedy is available, although the vendor may have an action at law for the purchase money.”<sup>36</sup>

Despite their factual similarities, these two cases present acutely contradictory philosophies regarding the discretion of the trial court to award the equitable remedy of specific performance in the context of a breaching purchaser and what findings may be necessary to support such an award. Because neither the majority nor the concurrence in *Kesler* refer to *Humphries* and the issue is

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28. *Id.*

29. *Id.*

30. *Id.* (citing *Wagner v. Estate of Fox*, 717 N.E.2d 195, 200 (Ind. Ct. App. 1999)).

31. *Id.*

32. *Id.* at 897.

33. *Id.*

34. *Id.*

35. *Id.* at 898.

36. *Id.* (Sullivan, J., concurring) (quoting *Migatz v. Stieglitz*, 77 N.E. 400, 401 (Ind. 1906)).



merely discussed in dicta, *Kesler* does not overrule the earlier case. In a broader context, however, *Kesler* may be used along with century-old cases having similar holdings which have never been expressly disavowed, for the proposition that no award of equitable remedies is sustainable on appeal unless the trial court finds that no adequate remedy at law exists.

Although the historic unresolved tension between law and equity may seem esoteric, *Humphries* and *Kesler*, combined with last year's decision in *Crossmann Communities, Inc. v. Dean*,<sup>37</sup> indicate that the "well-settled rules" regarding law and equity in Indiana common law appear to rest on a shaky foundation. This should be a matter of practical concern. The *Humphries* opinion placed weight upon the contractual remedies provision and the parties' intent to make both legal and equitable remedies available to both parties. However, the *Kesler* opinion failed to discuss the contractual remedies provisions and instead seems to stand for the proposition that regardless of the parties' bargain, the trial court has no discretion to award equitable relief unless it makes a factual determination that no adequate remedy at law exists. The court's approach to the remedies provision in *Humphries* makes no distinction between a provision that is specifically negotiated (i.e., "in the event of breach by the purchaser, the seller shall be entitled to specific performance of the contract") as opposed to boilerplate language that makes all remedies possible. In *Humphries*, the purchase agreement simply gave both parties all remedies at law or equity. It remains to be seen whether another panel of the court of appeals will view these boilerplate provisions so expansively. A jurist of Judge Kirsch's outlook would likely take a different view on how the common law of equity might interact with a boilerplate remedies provision. That is, if the common law does not permit equitable remedies in certain circumstances, may the parties overrule the common law by contract? If so, does the provision need to be specifically negotiated and clear, or does the boilerplate "all remedies at law or equity" suffice?

Most sophisticated commercial real estate purchase agreements include remedies provisions which: (1) limit a non-breaching seller's damages to the earnest money deposit, as liquidated damages; and (2) entitle a non-breaching purchaser to enforce specific performance. Neither *Humphries* nor *Kesler* directly challenge the enforceability of these provisions. Yet, until the historic differences expressed by Judge Sullivan and Judge Kirsch in these two cases are resolved by the Indiana Supreme Court, uncertainty will remain about whether future decisions may place limits on the availability of equitable relief, despite the parties having bargained for it. If specific performance may only be awarded by a trial court after a factual finding on the adequacy of monetary damages, a seller may decide to breach under certain circumstances, rolling the dice that the purchaser will not have the means or the will to pursue monetary damages. On a micro level, this uncertainty causes purchasers and sellers to reallocate their risk in ways that are difficult to predict. On a macro level, it can affect the economics of the commercial real estate market.

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37. 767 N.E.2d 1035 (Ind. Ct. App. 2002).



A few weeks after *Kesler* was decided, a court of appeals panel consisting of Judges Darden, Sullivan, and Baker addressed a case in which a trial court awarded specific performance to the purchaser under an oral contract for the purchase of land.<sup>38</sup> Although Judge Sullivan did not write the opinion of the court in *Hardin*, the philosophy expressed therein regarding the availability of specific performance is identical to that expressed in *Humphries* and makes no reference to *Kesler*.

At some point between 1995 and 1998, Mike and Annette Hardin, a married couple, had conversations with Mike's father, David, in which the parties evidently agreed that David would sell approximately eleven acres of land to Mike and Annette for \$4000 per acre so that they could build a home. In early 1998, Mike and Annette had the land surveyed, built a bridge across a creek and ravine to access the parcel, paid to extend utility lines to the property, contracted with an architect for blueprints, laid the foundation of the house, and began to construct a septic system.<sup>39</sup> David assisted Mike with some of the work on the property. At the end of 1999, Mike informed Annette that he wanted a divorce. Annette contacted David and offered to pay for the land immediately. David refused to accept her payment.<sup>40</sup> Annette filed a lawsuit against David, seeking damages for his breach of the oral purchase agreement in the form of either specific performance or monetary damages. The trial court concluded that an oral contract existed and that David had breached it. The court ordered David to sell the eleven acres to Annette alone for \$4000 per acre, and David appealed.<sup>41</sup>

The court of appeals began by stating, consistent with but without citing *Humphries*, that it reviews grants of specific performance under an abuse of discretion standard.<sup>42</sup> The court also reiterated that "a party seeking specific performance . . . must prove that he has substantially performed his contractual obligations or offered to do so."<sup>43</sup> The court did not separately analyze: (1) whether the oral contract is enforceable; and (2) if so, what remedy is appropriate. Instead, it noted that although contracts for the purchase of real estate are covered by the Statute of Frauds, oral promises to convey land "may be enforced under the doctrine of promissory estoppel"<sup>44</sup> and concluded that "[t]his evidence supports the trial court's conclusion that there was a promise to sell by David, made with the expectation that Mike and Annette would rely on it, which induced their reasonable reliance of a definite and substantial nature."<sup>45</sup> The court of appeals also found that "[t]here is sufficient evidence to support the trial court's conclusion that here, 'injustice can be avoided only by enforcement

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38. *Hardin v. Hardin*, 795 N.E.2d 482 (Ind. Ct. App. 2003).

39. *Id.* at 484.

40. *Id.* at 485.

41. *Id.*

42. *Id.* at 486.

43. *Id.* at 487.

44. *Id.* (quoting *Brown v. Branch*, 758 N.E.2d 48, 50 (Ind. 2001)).

45. *Id.* at 488.

of the promise."<sup>46</sup>

The *Hardin* opinion does not address whether the trial court made a factual finding that Mike and Annette did not have an adequate remedy at law. *Kesler* appears to stand for the proposition that such a factual finding is necessary for an Indiana appellate court to conclude that a trial court did not abuse its discretion in awarding specific performance. The failure of *Hardin* to discuss, or even acknowledge, the dichotomy revisited by *Humphries* and *Kesler* further underlines the unresolved tension in Indiana common law regarding the availability of specific performance as a remedy for the non-breaching party to a real estate purchase agreement.

## II. RELATIONSHIPS BETWEEN PRIVATE PARTIES

### A. Security Deposit Statutes

Each survey period brings at least one case dealing with whether, and upon what terms, a residential landlord must return a security deposit to a former tenant. This year, in *Lae v. Householder*,<sup>47</sup> the Indiana Supreme Court ruled that the forty-five day period in which a landlord must mail an itemized list of damages to a former tenant in order to offset those damages against a security deposit is tolled until the former tenant supplies the landlord with his new address.<sup>48</sup>

Lae ("Landlord") rented an apartment to Householder ("Tenant"). Forty-seven days after Householder vacated the apartment, his attorney mailed a letter to Lae requesting the return of Householder's security deposit pursuant to the Security Deposit Statute,<sup>49</sup> which requires that a landlord, within forty-five days after termination of occupancy under a residential lease, provide tenant with a list of damages claimed to offset a security deposit.<sup>50</sup> Landlord responded by filing a complaint against Tenant for damages to the apartment. The complaint did not contain an itemized list of damages. Tenant counterclaimed for the return of the security deposit, plus attorney fees. The trial court found in favor of Tenant based on Landlord's failure to comply with the Security Deposit Statute and Landlord appealed.<sup>51</sup> The court of appeals reversed, reasoning that Tenant's failure to provide Landlord with a forwarding address within forty-five days after termination of occupancy made it impossible for Landlord to comply and therefore relieved Landlord of his statutory obligation.<sup>52</sup> Tenant appealed.

The Indiana Supreme Court granted transfer and, after analyzing the Security Deposit Statute using the standard rules of statutory construction, found that a

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46. *Id.* (quoting *Brown*, 758 N.E.2d at 52).

47. 789 N.E.2d 481 (Ind. 2003).

48. *Id.* at 485.

49. IND. CODE § 32-31-3-12 (1998).

50. *Lae*, 789 N.E.2d at 482.

51. *Id.* at 482-83.

52. *Id.* at 483.



landlord's obligation to provide an itemized list of damages to tenant does not begin to run until tenant provides landlord with a forwarding address.<sup>53</sup> The court concluded, "[i]f the tenant has not supplied an address within the forty-five day period, we think tolling the landlord's obligation until a forwarding address is furnished is more consistent with . . . the purpose of the statute."<sup>54</sup>

*B. Guaranties—Limitations and Enforceability*

In *Boonville Convalescent Center v. Cloverleaf Healthcare Services, Inc.*,<sup>55</sup> the court of appeals examined a complicated series of assignments concerning a commercial lease to determine whether the original guarantees were still in effect. Boonville Convalescent Center ("Boonville") leased a nursing home to Cloverleaf Healthcare Services, Inc. ("CHS") for a term of twenty years. The lease was personally guaranteed by a number of officers of CHS and their spouses. Approximately one month later, CHS assigned the lease to a newly created organization, CHB, having the same officers, directors, and shareholders as CHS.<sup>56</sup> The personal guarantors of CHS reaffirmed the guarantee of the lease agreement. Approximately five years later, CHB subleased the nursing home to Sherwood Healthcare Corp. ("SHC"), a newly created entity owned by CHS's controller, and assigned its interest as lessee and sublessor to BritWill Investments. BritWill Investments subsequently assigned its interest as lessee and sublessor to BritWill Healthcare Company, which later changed its name to Raintree Healthcare Corp. Approximately one year later, a number of the personal guarantors once again reaffirmed their obligations as guarantors of the lease, and approximately two years later, the remaining personal guarantors reaffirmed their obligations under the lease.<sup>57</sup> Approximately six years later, Raintree notified Boonville of its intention to file bankruptcy and reject the lease. Boonville contacted CHS and its personal guarantors and called on them to honor their obligations under the lease, but neither CHS nor the personal guarantees would take control of the facility. Raintree left the facility in a state of disrepair and forty percent vacant.<sup>58</sup> In an effort to mitigate damages and maintain its license, Boonville operated the facility as Southwind Healthcare, Inc. on a temporary basis while continuing to look for a permanent tenant or buyer. Southwind and Raintree executed an agreement which purported to be a temporary lease which had been entered into in order to mitigate damages and to maintain operation and management of the facility. The Agreement contained no language which released Raintree from its obligations under the lease.<sup>59</sup> Subsequently, Boonville sent letters to CHS and the personal guarantors

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53. *Id.* at 483-84.

54. *Id.* at 485.

55. 790 N.E.2d 549 (Ind. Ct. App. 2003)

56. *Id.* at 551-52.

57. *Id.* at 552.

58. *Id.* at 553-56.

59. *Id.* at 553-54.

demanding that they pay the amounts due under the lease and assist in finding a replacement tenant. Boonville filed a claim in Raintree's bankruptcy seeking payment of obligations due under the lease and filed a complaint against CHS and the personal guarantors of the lease for payments of obligations under the lease.<sup>60</sup> CHS and the personal guarantors filed a motion for summary judgment on grounds that the agreement between Raintree and Southwind constituted an acceptance by Boonville of Raintree's rejection of the lease and that CHS and the personal guarantors were thus relieved of their obligations under the lease. The trial court granted the motion for summary judgment in favor of CHS and the personal guarantors, and Boonville appealed.<sup>61</sup>

The court of appeals reversed and remanded the case back to the trial court.<sup>62</sup> The court noted that in determining whether the surrender of a lease has been accepted, the court must examine the acts of the parties.<sup>63</sup> In the absence of a writing supported by consideration to that effect, a surrender will only be deemed accepted by operation of law when the parties do some act that is a decisive and unequivocal manifestation of lessor's acceptance of the surrender.<sup>64</sup> In this case, the evidence does not show any such manifestation of acceptance of surrender of the lease by Boonville. Rather, Boonville continued to send demand letters to CHS and the personal guarantors of the lease, and the agreement between Southwind and Raintree stressed that it reserved all of its rights and claims under the existing lease agreement against the guarantors of the lease.<sup>65</sup> Southwind only assumed operation of the facility out of necessity. Under these circumstances, the surrender of the lease was not accepted by Boonville, and CHS and the personal guarantors continued to be obligated under the lease.<sup>66</sup>

In *JSV, Inc. v. Hene Meat Co.*,<sup>67</sup> the court of appeals clarified that one cannot escape the essential nature of a "personal guaranty," even one which omits the word "personal."<sup>68</sup> JSV, Inc. ("JSV") signed a lease to rent space from Hene Meat Company ("Hene"). Mark Kennedy ("Kennedy") signed the lease as an officer of JSV and also signed a contemporaneous document labeled "Guaranty." The document stated that it was an unconditional guaranty of JSV's obligations under the lease.<sup>69</sup> Nothing in the document indicated that Kennedy was executing the guaranty in anything other than his individual capacity. JSV defaulted on the lease, and Hene sued JSV and Kennedy. The trial court granted summary judgment in favor of Hene on its claim that Kennedy was personally

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60. *Id.* at 554.

61. *Id.* at 554-55.

62. *Id.* at 557.

63. *Id.* at 556 (citing *Mileusnich v. Novogroder Co.*, 643 N.E.2d 937, 939 (Ind. Ct. App. 1995)).

64. *Id.* at 556-57.

65. *Id.* at 557.

66. *Id.*

67. 794 N.E.2d 555 (Ind. Ct. App. 2003).

68. *Id.* at 560.

69. *Id.* at 557.



liable under the guaranty, and Kennedy appealed.<sup>70</sup>

The court of appeals concluded that the guaranty signed by Kennedy was “unambiguously a personal guaranty, notwithstanding the fact that the word ‘personal’ does not appear in the document.”<sup>71</sup> The court noted that there would have been “no point” for Hene to have Kennedy execute the guaranty in his capacity as an officer of JSV because “[s]uch an action would have been equivalent to JSV guaranteeing JSV’s performance of the lease and to JSV being both obligor under the lease and guarantor under the guaranty.”<sup>72</sup> Such an outcome, the court stated, would have been “paradoxical and untenable.” Therefore, the reasonable interpretation is that the “Guaranty” was a personal guaranty by Kennedy.<sup>73</sup>

### *C. Derivative Actions Against Owners’ Association in Office Park*

*Edgeworth-Laskey Properties, L.L.C. v. New Boston Allison Ltd. Partnership*<sup>74</sup> highlights a few of the problems which can arise when a developer uses a number of related entities in a single development without treating them as completely independent entities and underscores the importance of careful drafting of reciprocal easement and similar agreements.

SMT Realty, Ltd. (“SMT”) acquired raw land that it intended to develop into an office park called Allison Pointe. As part of its pre-development, SMT executed a Declaration of Development Standards, Covenants, and Restrictions for Allison Pointe (“Declaration”). Because SMT was the owner of the real estate, it was the only party to the Declaration.<sup>75</sup> The Declaration provided for a “Developer,” defined as SMT and its successors and assigns, which had certain powers. These powers included appointment powers for a Development Advisory Board (the “Board”), which Board had the right and responsibility under the Declaration to approve site plans before construction may commence at Allison Pointe. The Declaration also provided for the creation of the Allison Pointe Owners Association, Inc. (“Association”), of which all owners of real estate in Allison Pointe were automatically members.<sup>76</sup> SMT changed its name to Allison Pointe Realty, L.P. (“APR”), and the Declaration was amended to reflect that change. APR then sold its remaining undeveloped parcels in Allison Pointe to Citimark I. Those parcels were then conveyed to New Boston Allison Limited Partnership (“New Boston”).<sup>77</sup> Citimark I, the sole remaining partner of APR, then became a limited partner of New Boston. No amendment to the Declaration was recorded which reflected the transaction to New Boston,

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70. *Id.* at 558.

71. *Id.* at 560.

72. *Id.*

73. *Id.*

74. 793 N.E.2d 298 (Ind. Ct. App. 2003).

75. *Id.* at 299-300.

76. *Id.* at 300.

77. *Id.*

although Citimark I executed an "Assignment" in favor of New Boston, which purported to assign all of APR's rights, responsibilities, and obligations as Developer to New Boston.<sup>78</sup>

New Boston sold four parcels of land to Edgeworth-Laskey Properties, L.L.C. ("E-L"). In the fourth transaction, the purchase agreement provided that New Boston would "cause" the Board to approve E-L's site plans within five business days after submittal and under a standard of less discretion than provided in the Declaration. E-L submitted its site plans to the Board, and those plans were rejected because E-L did not include a preliminary grading plan.<sup>79</sup> E-L filed a complaint against New Boston. Count I is styled as a derivative action and sought a declaration that New Boston is not the Developer pursuant to the Declaration.<sup>80</sup> Count II sought a declaration that the Board is bound by the purchase agreement between New Boston and E-L and that the plans submitted for the fourth parcel are deemed approved. The trial court granted New Boston's cross-motion for summary judgment on both counts.<sup>81</sup>

On Count I, the court of appeals did not address the substance of E-L's claim that New Boston was not properly designated as APR's successor because it found that E-L did not have standing to bring a derivative lawsuit.<sup>82</sup> The court noted that derivative actions must comply with Indiana Trial Rule 23.1 and Indiana Code section 23-1-32-1, which means that shareholders or members must satisfy four requirements to bring such an action:

- (1) the complaint must be verified; (2) the plaintiff must have been a shareholder or member at the time of the transaction of which he or she complains; (3) the complaint must describe the efforts made by the plaintiff to obtain the requested action from the board; and (4) the plaintiff must fairly and adequately represent the interests of the shareholders or members.<sup>83</sup>

In light of these requirements, the court found that E-L did not have the standing to bring the derivative lawsuit because it was not a member of the Association at the time that the Assignment was executed and recorded.<sup>84</sup>

The court noted that Count II was brought against the Board, rather than New Boston, which E-L claims breached their purchase agreement by failing to compel the Board to approve their site plan.<sup>85</sup> The court found that E-L has no claim against the Board because the Board was not a party to the purchase agreement and a "trial court cannot require a non-contracting party to adhere to

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78. *Id.* at 300-01.

79. *Id.* at 301-02.

80. *Id.* at 302.

81. *Id.*

82. *Id.* at 304.

83. *Id.* at 305.

84. *Id.*

85. *Id.* at 307.



the contractual terms.”<sup>86</sup> The court noted that:

It is irrelevant to our analysis that New Boston, as Developer, appointed all five members of the Advisory Board because those appointments alone do not suggest that New Boston has the authority to require the Advisory Board to approve or disapprove of certain submissions within a specified period of time. Indeed, if that were the case, there would be no need for the establishment of the Advisory Board.<sup>87</sup>

### III. TITLE AND RECORDING ISSUES

#### A. *Nature of Railroad Interests in Land*

The court of appeals addressed a seemingly archaic but apparently still practical issue twice during the survey period: what is the proper way to interpret historic railroad deeds to determine the nature of railroad interests in land?

The first case was *Louisville & Indiana Railroad v. Indiana Gas Co.*<sup>88</sup> The Ohio & Indianapolis Railroad Co., the predecessor to the Louisville & Indiana Railroad Co. (the “Railroad”) was chartered by the Indiana General Assembly in 1832, which charter was amended in 1846 and 1849. The 1832 charter gave the Railroad the power to purchase real estate, but did not expressly provide that the Railroad had the authority to hold the real estate in fee simple. In 1849, the General Assembly approved an act which expressly allowed the Railroad to take property in fee simple.<sup>89</sup>

In 1846, a deed from Wales to the Railroad read, in relevant part, as follows:

I, Leonard Wales . . . for and in consideration of the advantages which will or may result to the public in general and myself in particular, by the construction of the . . . Rail Road, . . . do hereby . . . Release and Relinquish, to the [Railroad], the Right of Way, and all my interest in so much of the following described piece or parcel of Land, as the said company are, by charter, entitled to hold, for the purpose of constructing said road.<sup>90</sup>

In 1852, Irwin executed a deed in favor of the Railroad using almost identical language.<sup>91</sup>

The question raised in *Louisville & Indiana Railroad* is straightforward—did the Wales and Irwin deeds convey a fee simple in the parcels to the Railroad, or did the Railroad take only an easement? The Indiana Gas Company argued that

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86. *Id.*

87. *Id.* at 307 n.6.

88. 792 N.E.2d 885 (Ind. Ct. App. 2003), *trans. granted*.

89. *Id.* at 887-88.

90. *Id.* at 888.

91. *Id.*

the Railroad took only an easement on two grounds: (1) the 1832 charter did not expressly provide that the Railroad could own property in fee simple, and the 1849 act did not retroactively cure the Wales deed; and (2) the language in the Wales and Irwin deeds was insufficient to convey a fee simple interest in the parcels.<sup>92</sup> After briefly discussing the nature of curative statutes, the court held that

the 1849 Act was curative legislation that merely acted to clarify the power of the Railroad to hold land in fee simple. Since the curative act retroactively gave the Railroad the power to hold property in fee simple, the Railroad had the authority to take and hold the property in fee simple.<sup>93</sup>

With respect to the underlying question, the court noted that the Indiana Supreme Court adopted general rules of construction for conveyances of land to railroads in *Hefty v. All Other Members of the Certified Settlement Class*,<sup>94</sup> including the following general principles: (i) references to the conveyance of a "right-of-way" in a deed "generally leads to its construction as conveying only an easement;" (ii) deeds prepared by railroads will be construed in favor of the grantors; and (iii) if ambiguity exists in the deed, such ambiguity will be generally resolved in favor of the original grantors and their successors.<sup>95</sup>

The court noted that the Wales and Irwin deeds contained two seemingly contradictory phrases: "right-of-way" and "all my interest in so much of the following described piece or parcel of Land."<sup>96</sup> The court did not interpret these two phrases to create an ambiguity, however, holding that "the conveyance unambiguously reflects a desire to convey the land in fee simple and not simply an easement. Thus, the language of the deeds here is outside the scope of *Hefty*'s general rule."<sup>97</sup>

The court of appeals examined slightly different language in *Poznic v. Porter County Development Corp.*<sup>98</sup> Poznic obtained property in 1987 that was located directly north of and adjacent to Wabash Avenue, which was directly north of and adjacent to property identified as "Railroad Property."<sup>99</sup> Poznic sought to quiet title in herself in both the Railroad Property and Wabash Avenue. Poznic argued that: (i) a 1892 deed to the Railroad conveyed an easement rather than fee simple, and thus when the Railroad ceased to use the property for Railroad purposes it reverted back to the grantor; and (ii) Wabash Avenue was never properly dedicated because it was never improved as a street, thus demonstrating that it was never validly accepted by the City. The trial court denied Poznic's

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92. *Id.* at 889-91.

93. *Id.* at 890.

94. 680 N.E.2d 843, 854-55 (Ind. 1997).

95. *Louisville & Ind. R.R.*, 792 N.E.2d at 891.

96. *Id.*

97. *Id.*

98. 779 N.E.2d 1185 (Ind. Ct. App. 2002).

99. *Id.* at 1188.



complaint holding that the Railroad received a fee simple and that Wabash Avenue was properly dedicated, and Poznic appealed.<sup>100</sup>

The court of appeals affirmed the trial court on both issues, holding that the 1892 deed to Railroad conveyed a fee simple interest in the property.<sup>101</sup> The court considered the following factors: (i) the language “‘grant, bargain, sell, remise, release, alien, and confirm’ forever a strip of land . . . goes above and beyond what was and still is statutorily defined as a fee simple conveyance;” (ii) the word “forever” is more consistent with conveyance of a fee than an easement; (iii) consideration of \$2985.43 was not a nominal amount in 1892 and the “mere benefit of construction of the railroad was not the consideration for the deed;” (iv) the deed conveyed “a strip of land for railroad purposes” without limiting language rather than a mere “right” to the property; (v) there was no language in the deed providing that it could be voided for use other than Railroad purposes or for any other purpose; (vi) there was no language referring to a right-of-way conveyance; and (vii) the habendum clause promised to “‘warrant and deed’ the grantee ‘against all lawful claims whatever,’” used the word forever, and contained no limiting language.<sup>102</sup>

The court also held that Wabash Avenue was properly dedicated to and accepted by the City because it satisfied the four *Beaman*<sup>103</sup> requirements for statutory dedication. These include: (i) the street was platted in the First Addition neighborhood; (ii) the plat must have been acknowledged to an authorized officer because it was recorded; (iii) even though there was no evidence of municipal approval, the plat would not have been accepted for recording if a statutorily required certificate of approval had not been attached, so the dedication must have obtained proper municipal approval, and (iv) the plat was recorded.<sup>104</sup>

### *B. Chain of Title*

In *Bank of New York v. Nally*,<sup>105</sup> the court of appeals raised new questions about the manner in which chain of title operates in Indiana, and under what circumstances a recorded document may be deemed to impart constructive notice. On a single day, three documents were executed: (1) a deed from Owens to Nally (the “Deed”); (2) a mortgage for a portion of the purchase price from Nally to Owens (the “Owens Mortgage”); and (3) a mortgage for the remainder of the purchase price to Amtrust Financial Services (the “Amtrust Mortgage”).<sup>106</sup> The Owens Mortgage was recorded on December 26, 1996. However, the Deed and the Amtrust Mortgage were not recorded until January 21, 1997. Thus, the

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100. *Id.* at 1188-92.

101. *Id.* at 1193.

102. *Id.* at 1190-91.

103. *Beaman v. Smith*, 685 N.E.2d 143 (Ind. Ct. App. 1997).

104. *Poznic*, 779 N.E.2d at 1192-93.

105. 790 N.E.2d 1071 (Ind. Ct. App. 2003).

106. *Id.* at 1073.

Owens Mortgage was recorded before the Deed.<sup>107</sup> Nally later refinanced with Equivantage in order to payoff Amtrust. The mortgage in favor of Equivantage (the "Equivantage Mortgage"), which was later assigned to the Bank of New York (the "Bank") was recorded on June 12, 1998. Nally stopped making payments on the Equivantage Mortgage and the Bank initiated foreclosure proceedings.<sup>108</sup> Owens filed a motion to intervene. The trial court found that Owens had a valid first mortgage on the property, and the Bank appealed.<sup>109</sup>

The central question of the Bank's appeal was whether or not it had constructive notice of the Owens Mortgage.<sup>110</sup> Indiana Code section 36-2-11-12(b) requires county recorders to maintain separate indexes for (a) deeds and (b) mortgages.<sup>111</sup> The court held that a purchaser is held to have constructive notice of documents recorded in both the deed book index and the mortgage book index.<sup>112</sup>

The court's analysis of this issue, however, somewhat muddies Indiana common law regarding the nature and scope of constructive notice. First, the court notes that the Owens Mortgage was recorded before the Deed, "[t]hus, until the Hamilton County recorder's office received the [Deed], Nally was not the record title owner and there was no place to put the [Owens Mortgage] in the grantor-grantee index."<sup>113</sup> This statement appears to assume that the recorder is required to cross-reference a mortgage to the most recent deed of record. In fact, the recorder is not required to create such cross-references as a matter of course and, in reality, cannot cross-reference mortgages to deeds without an explicit reference in the mortgage to the deed's instrument number, a piece of information which is absent from most mortgages.

The court makes the conclusory statement that because the Owens Mortgage was recorded before the refinancing, the Bank should have been able to find it.<sup>114</sup> Missing from the court's analysis is the concept that the Owens Mortgage must be in the chain of title to the property to impart constructive notice to the Bank. The central question unanswered by *Bank of New York* is whether constructive notice vis-a-vis a particular owner of property occurs as of the *effective* date of a deed transferring ownership to that person or the *recording* date. *Bank of New York* appears to assume, without acknowledging the issue, that one has constructive notice of all encumbrances on a person's title after the time that such person takes title, as opposed to the date that the deed transferring title is recorded.

Generally, deeds are recorded soon after a conveyance takes place. But what if a deed is recorded significantly later or not at all? *Bank of New York* appears

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107. *Id.*

108. *Id.* at 1073-74.

109. *Id.* at 1074.

110. *Id.*

111. IND. CODE § 36-2-11-12(b) (2003).

112. *Bank of New York*, 790 N.E.2d at 1077.

113. *Id.* at 1076.

114. *Id.* at 1077.



to stand for the proposition that encumbrances on title, whether recorded before the deed or not, are still capable of imparting constructive notice. This seems to be in conflict with the holding in *Keybank National Ass'n v. NBD Bank*,<sup>115</sup> which cautions that: "A person charged with the duty of searching the records of a particular tract of property is not on notice of any adverse claims which do not appear in the chain of title; because, otherwise, the recording statute would prove a snare, instead of a protection."<sup>116</sup>

### C. Sufficiency of Legal Description

In *Farm Credit Services ACA v. Estate of Mitchell*,<sup>117</sup> the court of appeals clarified that for a UCC financing statement to be enforceable, the affected real estate must be identified "reasonably."<sup>118</sup> Mitchell ("Borrower") executed a promissory note with Farm Credit Services ("FCS") and granted FCS a security interest in the following collateral: "Collateral described as follows, including but not limited to collateral located in JOHNSON County, Indiana: All crops growing, grown, or to be grown on real estate and all harvested crops and all processed crops, whether or not produced by Borrowers/Debtors."<sup>119</sup>

Borrower passed away. Standing crops, but no realty, were identified as an asset of the estate. The crops were harvested and sold for cash.<sup>120</sup> FCS filed a notice of claim against the estate. The personal representative filed a petition to determine whether FCS had a security interest in the crops "because the documents failed to describe the real estate upon which the crops were grown as specifically required by the Uniform Commercial Code."<sup>121</sup> The probate court ruled that FCS had an unsecured claim for failing to describe the real estate with enough specificity, and FCS appealed.<sup>122</sup>

The court of appeals found that "the description 'Johnson County,' does not reasonably describe the land upon which the crops were to be grown because it does not reasonably identify the land upon which the crops were grown. No street address or legal description was included in the description to provide reasonable identification."<sup>123</sup> The judgment of the trial court was affirmed.<sup>124</sup>

### D. Dedication and Adverse Possession

In *AmRhein v. Eden*,<sup>125</sup> the court of appeals reiterated a few principles

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115. 699 N.E.2d 322 (Ind. Ct. App. 1998).

116. *Id.* at 327 (citing *Stead v. Grosfield*, 34 N.W. 871, 874 (Mich. 1887)).

117. 790 N.E.2d 592 (Ind. Ct. App. 2003).

118. *Id.* at 595.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 594.

123. *Id.* at 595.

124. *Id.*

125. 779 N.E.2d 1197 (Ind. Ct. App. 2002).

relating to the status and proper vacation of public ways. The Edens and AmRhein were neighboring landowners. AmRhein's property was located both to the south and the east of the Edens' property with an L-shaped area of land between them.<sup>126</sup> In 1946, a dispute arose between the then owners of the property, the Johnsons and the Carpenters, regarding the L-shaped property. The resulting judgment from that litigation established a "right of way, alley or street" from which the Johnsons were perpetually enjoined from obstructing or interfering with its free use.<sup>127</sup>

From 1950 to 1956, the Carpenters owned both the property now owned by the Edens and the property now owned by AmRhein. In 1956, when one parcel was conveyed to AmRhein, a fence was located three feet inside the L-shaped parcel. AmRhein considered the fence line to be the boundary and the L-shaped area outside the fence to be a public right of way.<sup>128</sup> Eden also considered the fence line to be the boundary of his property, with no knowledge of any L-shaped right of way. Eden and AmRhein both cared for the property up to the fence line, and AmRhein and his son used the L-shaped alley on the Edens' side of the fence approximately twelve times per year either walking, or on a tractor or motorcycle.<sup>129</sup>

Upon learning of the Edens' intent to put a modular home on the L-shaped alley, AmRhein informed the Edens of the right of way. The Edens proceeded to put the home, deck, and driveway on the property encroaching on the alley.<sup>130</sup> The Edens filed a petition to vacate the public way and the County Board granted the petition.<sup>131</sup> AmRhein filed a complaint against the Edens seeking ejectment from one-half of the right of way. The Edens filed a cross-complaint alleging trespass, seeking a declaratory judgment entitling them to the benefits of the injunction in the 1946 judgment, and seeking to quiet title to the Alley under the theories of adverse possession and/or acquiescence.<sup>132</sup> The trial court ruled in favor of the Edens, determining that (i) AmRhein failed to establish the existence of a public way, (ii) in any case, any such right of way was extinguished by the common ownership of the two surrounding parcels from 1950 to 1956, (iii) the fence had been established as the true boundary between the parcels, and (iv) the parties have acquired title up to the fence by adverse possession.<sup>133</sup>

The court of appeals reversed and remanded the case to the trial court with instructions to divide the alley in half between the Edens and AmRhein and quiet title in each of them to their respective halves.<sup>134</sup> The court held that the 1946

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126. *Id.* at 1200.

127. *Id.* at 1201.

128. *Id.* at 1201-02.

129. *Id.* at 1202.

130. *Id.*

131. *Id.* at 1202-03.

132. *Id.* at 1203.

133. *Id.* at 1203-04.

134. *Id.* at 1209.



judgment established the alley as a public highway created by user.<sup>135</sup> Furthermore, the alley was not abandoned merely because the land on both sides was under common ownership from 1950 to 1956. On the contrary, AmRhein continued to use the alley occasionally, and public use is the sole test for determining whether a public way has been abandoned. Since the alley continued to be a public way until it was vacated by the County Board in 1999, it was not susceptible to permanent rightful private possession by adverse possession or acquiescence.<sup>136</sup> Based on the presumption that abutting landowners own to the center of the street, when the street or public way is vacated, the title to the land reverts to the abutting property owner. Therefore, when the alley was vacated, it reverted one half to the Edens and one half to AmRhein as abutting landowners.<sup>137</sup>

#### IV. LAND USE LAW

##### A. *Constitutionality of Zoning Ordinance Defining "Family"*

The zoning dispute between Peter Dvorak and the City of Bloomington was first heard by the court of appeals in 1998.<sup>138</sup> In 2003, the Indiana Supreme court settled the matter in *Dvorak v. City of Bloomington*<sup>139</sup> and clarified the manner in which the methodology set forth in *Collins v. Day*<sup>140</sup> should be applied to constitutional challenges under article I, section 23 of the Indiana Constitution.

The City of Bloomington (the "City") has a municipal zoning ordinance (the "Ordinance") that limits the number of unrelated adults who may occupy a "dwelling unit" in areas of the City zoned for single family dwellings. Peter Dvorak ("Dvorak") was the owner of residential property in an area of Bloomington so zoned.<sup>141</sup> In 1996, the City filed a complaint against Dvorak, claiming that he and his five tenants were in violation of the Ordinance. Dvorak filed a motion for summary judgment, claiming that the Ordinance was void as an ultra vires act, that it violated the article I, section 23 of the Indiana Constitution, and that it violated Dvorak's right to due process.<sup>142</sup> The trial court denied the motion, and the court of appeals accepted the case on an interlocutory appeal, vacated the decision of the trial court, and remanded for further proceedings, including a determination of the goals the ordinance was designed to promote.<sup>143</sup> When the trial court found the Ordinance to be constitutional, Dvorak again appealed.

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135. *Id.* at 1207.

136. *Id.* at 1207-08.

137. *Id.* at 1209.

138. *Dvorak v. City of Bloomington*, 702 N.E.2d 1121 (Ind. Ct. App. 1998).

139. 796 N.E.2d 236 (Ind. 2003).

140. 644 N.E.2d 72 (Ind. 1994).

141. *Dvorak*, 796 N.E.2d at 237.

142. *Id.*

143. *Id.*

The court of appeals considered whether the Ordinance, which limits the number of unrelated adults who may live together in a single family residence, is constitutional under article I, section 23 of the Indiana Constitution, commonly known as the Privileges and Immunities Clause.<sup>144</sup> The court noted that a 1994 opinion by the Indiana Supreme Court, *Collins v. Day*, sets forth the framework for analyzing challenges to state action under article I, section 23. Under *Collins v. Day*, a state actor may create a legislative classification so long as: (1) the different statutory treatment is reasonably related to the inherent characteristics that distinguish the unequally treated class; and (2) the preferential treatment is uniformly applicable and equally available to all persons similarly situated.<sup>145</sup>

Under this framework, the court of appeals defined the "issue" in *Dvorak* as "whether there are inherent distinctions between households consisting of unrelated adults versus those consisting of related adults that are reasonably connected to imposing the burden of exclusion from some neighborhoods."<sup>146</sup> The court examined a number of cases from other states dealing with similar ordinances and found those authorities to be split. Turning back to the *Collins v. Day* test, the court noted that at the trial court level, the City presented evidence, via the testimony of the its planning director, that the goal of the ordinance was the "protection of core neighborhoods through the reduction of . . . external impacts such as traffic, trash generation, noise, and inappropriate parking of vehicles."<sup>147</sup> The planning director had further testified that "the basis for his conclusion that regulating unrelated adults would promote these values was based on 'professional literature' and 'planning premises' that unrelated adults cause greater external impacts than related adults through more independent lifestyles."<sup>148</sup> The court, unpersuaded by this testimony, held that the City failed to show that the legislative classification was "reasonable or substantial" because it was "based on mere planning premises without any documented support in professional literature."<sup>149</sup> It declared the Ordinance unconstitutional and void because it violated article I, section 23 of the Indiana Constitution.<sup>150</sup> The City petitioned for transfer, and the Indiana Supreme Court granted transfer and vacated the decision of the Indiana Court of Appeals, essentially reinstating the Ordinance pending resolution of the appeal.<sup>151</sup>

In 2003, a unanimous Indiana Supreme Court, in a decision written by Justice Dickson, the author of *Collins v. Day*, held that the Ordinance does not violate article I, section 23 of the Indiana Constitution, nor is it *ultra vires* legislation.<sup>152</sup>

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144. *Dvorak v. City of Bloomington*, 768 N.E.2d 490 (Ind. Ct. App. 2002), *trans. granted, opinion vacated*.

145. *Id.* at 495.

146. *Id.*

147. *Id.* at 496-97.

148. *Id.*

149. *Id.* at 497.

150. *Id.* at 498.

151. *Dvorak v. City of Bloomington*, 796 N.E.2d 236 (Ind. 2003).

152. *Id.* at 241.



The court reiterated that because of the strong presumption of the constitutionality of statutes and local ordinances, the party challenging the constitutionality of an enactment bears the burden of proof.<sup>153</sup> The court found that the appeal presented two issues under the *Collins v. Day* rubric: “whether Dvorak has demonstrated either (1) that the ordinance’s disparate treatment of two classes of persons is not reasonably related to their distinguishing inherent characteristics, or (2) that the preferential treatment accorded one of the classes is not uniformly applicable and equally available to all persons.”<sup>154</sup>

On the first issue, the supreme court found that the answer is

self-evident: limiting multiple-adult households in single-family residential zones to families, and excluding non-families, is reasonably related to the difference between families and non-families. To put it another way, considering whether groups are or are not families is obviously related to determining whether to exclude them from districts zoned for family residential use.<sup>155</sup>

On the second issue, the court noted that Dvorak argued that the Ordinance accorded preferential treatment to some because some number of homes were “grandfathered” into a higher limit. The court found this alleged deficiency to be “insubstantial and does not render the ordinance contrary to section 23.”<sup>156</sup>

Although not argued by the parties in their briefs to the Indiana Supreme Court, the court chose to address the *ultra vires* issue raised to the court of appeals. After discussing the Home Rule Act and the enabling legislation, the court found that “the enactment of zoning ordinances that make distinctions based on familial relations of the users of residential real estate is an integral component of implementing [their] legislative objectives.”<sup>157</sup>

### *B. Denial of Application for Preliminary Plat Approval*

In two cases this survey period, the court of appeals addressed the amount of discretion given to local plan commissions with respect to their review of applications for preliminary plat approval. In the first case, *Van Vactor Farms, Inc. v. Marshall County Plan Commission*,<sup>158</sup> Van Vactor Farms (“Van Vactor”) filed an application for preliminary plat approval (the “Application”) to create a residential subdivision on certain farmland that it owned in Marshall County (the “Parcel”). The Parcel is adjacent to two roads, both two-lane rural roadways used frequently by farmers.<sup>159</sup> The Marshall County Plan Commission (“Commission”) conducted public hearings on the Application and heard

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153. *Id.* at 238.

154. *Id.* at 239.

155. *Id.* at 239-40.

156. *Id.* at 240.

157. *Id.* at 241.

158. 793 N.E.2d 1136 (Ind. Ct. App. 2003).

159. *Id.* at 1139.

evidence that “the roadways could not safely accommodate additional traffic, that a risk of groundwater contamination existed due to septic tank use, and that there were risks associated with the application of wastewater sludge on the [Parcel] for many years.”<sup>160</sup> Citing these three factors, the Commission denied the application. Van Vactor appealed, and the trial court upheld the decision of the Commission.<sup>161</sup> Van Vactor again appealed.

Van Vactor challenged the validity of the Marshall County Subdivision Control Ordinance (the “Ordinance”) provisions cited by the Commission in its denial of the plat, arguing that they did not set forth “concrete and specific standards” to guide the Commission’s discretion. Nonetheless, the court of appeals noted that other provisions of the Ordinance did contain concrete and specific standards.<sup>162</sup>

A plan commission’s only task when reviewing an application for preliminary plat approval is to determine whether the proposed plat complies with the concrete standards set forth in the subdivision control ordinance, and the commission cannot deny an application on the basis of factors outside the ordinance.<sup>163</sup>

After reviewing the Findings of Fact and Conclusions of Law adopted by the Commission, the court of appeals found that the Commission erred in referring to a general preamble-like section as its sole basis for disapproving the plat on the basis of the septic system and wastewater sludge when more specific provisions should have been considered and cited in the Commission’s written findings.<sup>164</sup> However, because the Commission cited to specific and concrete standards with reference to its findings concerning the roadways and traffic, the court found that the Commission gave Van Vactor fair notice of the reasons for its disapproval of the plat.<sup>165</sup> “Accordingly, we conclude that the Commission appropriately denied the preliminary subdivision plat on the basis of the rural character of the roadways and increased traffic.”<sup>166</sup>

In the second case, *Fulton County Advisory Plan Commission v. Groninger*,<sup>167</sup> the Groningers applied for preliminary plat approval for a residential subdivision that would enter and exit onto County Road 300 South, a highway. The Fulton County Advisory Plan Commission (the “Commission”) denied the plat because it violated the Vision Clearance Standards articulated in the Fulton County Zoning Ordinance.<sup>168</sup> The Vision Clearance Standards contain three criteria—two of which are concrete and measurable and a third catch-all:

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160. *Id.*

161. *Id.* at 1139-42.

162. *Id.* at 1143.

163. *Id.* at 1144.

164. *Id.* at 1144-46.

165. *Id.* at 1146.

166. *Id.* at 1147.

167. 790 N.E.2d 541 (Ind. Ct. App. 2003), *trans. granted, opinion vacated*.

168. *Id.* at 543.



“The visibility to or from the desired location is determined to be impaired by the Zoning Administrator.”<sup>169</sup> The Groningers filed an action asking that the trial court mandate the Commission to grant plat approval. The trial court granted the Groningers’ motion for summary judgment and the Commission appealed.<sup>170</sup>

The court of appeals noted that a “mandate” is an “extraordinary” equitable remedy that may only be used when the requesting party has a “clear and unquestioned legal right to the relief sought and [shows] that the respondent has an absolute duty to perform the act demanded.”<sup>171</sup> The court also noted that “in order to be valid, an ordinance must be definite, precise, and certain in expression” and “standard[s] must be written with sufficient precision to give fair warning as to what the Commission will consider in making its decision.”<sup>172</sup> The Groningers argued that the catch-all provision is not sufficiently definite and gives the Commission great discretion without any basis. The court of appeals agreed with the Groningers:

The third criterion states only that the application may be denied if the Zoning Administrator deems the visibility to be impaired. No further standards or instructions are provided concerning how the Zoning Administrator is to determine if visibility is impaired or how an applicant can avoid or correct such an impairment. Thus, a member of the public is not given sufficient notice of what the Plan Commission will consider when reviewing a plat application to determine if highway visibility is impaired.<sup>173</sup>

The mandate ordered by the trial court was upheld.<sup>174</sup>

### *C. Enforceability of Fees for Permits*

At issue in *Area Plan Commission v. Evansville Outdoor Advertising, Inc.*,<sup>175</sup> are four ordinances which empower the Area Plan Commission of Evansville (the “APC”) to “establish and collect a schedule of reasonable fees associated with processing and hearing administrative appeals, petitions for rezoning, special uses, variances, subdivisions, reviewing permit applications, issuing permits, and other official actions taken under IC Title 36.”<sup>176</sup> Particularly at issue is the fee schedule established by the APC with regard to permits for off-premises signs, more commonly known as billboards. The previous fee for billboard permits had been \$100. Pursuant to the above-described ordinance, the APC established a fee

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169. *Id.*

170. *Id.* at 543-44.

171. *Id.* at 544.

172. *Id.* at 545.

173. *Id.* at 546-48.

174. *Id.* at 549.

175. 789 N.E.2d 96 (Ind. Ct. App. 2003).

176. *Id.* at 98.

of \$1 per square foot with a minimum charge of \$100.<sup>177</sup> This resulted in an approximately 600% increase in the permit fee for a new billboard. Eighteen months after the new fee schedule became effective, Evansville and Vanderburgh County established new ordinances which more strictly regulated the placement of billboards. These new ordinances decreed that permit fees for billboards should be based on the "total display area" of the billboards.<sup>178</sup>

Evansville Outdoor Advertising ("Evansville Outdoor") filed a declaratory judgment action against the Area Plan Commission of Evansville (the "Commission"), the City of Evansville, and the Board of Commissioners of Vanderburgh County, seeking to have the four ordinances declared void. The trial court ruled in favor of Evansville Outdoor, finding that the APC's fee schedule is "not reasonably related to the administrative cost of exercising regulatory power," being used for the purpose of discouraging billboards, and therefore "impermissible."<sup>179</sup> The trial court also found that the Evansville and Vanderburgh County ordinances which state that permit fees should be based on "total display area" were also invalid, even though they did not establish the amount of said fees.<sup>180</sup>

The court of appeals reversed the trial court's decision with respect to the Evansville and Vanderburgh County sign ordinances, holding that:

The local legislative bodies clearly had a rational basis for requiring billboard permit fees to be based on total display area, as one could reasonably infer a correlation between sign size and administrative cost incurred by the APC. Therefore, the trial court erred in declaring Vanderburgh County, Ind., Code § 17.27.50(D) and Evansville, Ind., Code § 15.153.07.124(D) void.<sup>181</sup>

The court of appeals noted that the trial court's inquiry should have been limited to whether the APC's fee schedule violated Indiana Code section 36-1-3-8(a)(5), which provides that a local legislative body does not have "[t]he power to impose a license fee greater than that reasonably related to the administrative cost of exercising a regulatory power."<sup>182</sup> The court noted that the trial court did not make a finding as to whether Evansville Outdoor had shown that the APC's fee schedule was "obviously and largely beyond what is needed for the regulatory services rendered."<sup>183</sup> The case was remanded to the trial court for a determination of whether the APC fee schedule violates the Home Rule Act.<sup>184</sup>

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177. *Id.*

178. *Id.* at 98-99.

179. *Id.* at 99-100.

180. *Id.* at 102.

181. *Id.* at 103.

182. *Id.* at 104 (quoting IND. CODE § 36-1-3-8(a)(5) (2003)).

183. *Id.*

184. *Id.*



*D. Equitable Estoppel and Zoning*

The court of appeals addressed a complicated set of facts in *Brown County v. Booe*,<sup>185</sup> and held that, at least in the zoning enforcement context, a private citizen may assert the principle of equitable estoppel against a governmental entity under limited circumstances.<sup>186</sup> The Brown County zoning ordinance establishes a number of zoning districts in unincorporated areas of the county, including forest reserve ("FR"), industrial, and residential 2 ("R-2"). Pursuant to the ordinance, any property located within 300 feet of a county road is designated R-2. No industrial uses are permitted as special exceptions in R-2 districts, however, some industrial uses are permissible as special exceptions in the FR districts.<sup>187</sup>

In 1974, Booe purchased a tract of land and began operating a sawmill. He applied for a special exception, noting that his land was in the FR district. That petition was denied by the Board of Zoning Appeals of Brown County ("BZA") because of "road condition & residential area."<sup>188</sup> The next year, Booe again applied for a special exception permit and provided the BZA with a hand drawn map that depicted his sawmill as more than 400 feet from a county road. Again, the BZA denied the special exception.<sup>189</sup> Finally, in 1976, Booe's third application was approved after he admitted that he had been operating the sawmill illegally for two years and gave the BZA evidence that his sawmill was located 418 feet from Brown Hill Road.<sup>190</sup>

In 1994, Booe decided to subdivide his property and submitted a plat to the Plan Commission, which was subsequently approved. The plat included a three-acre Tract I-1, which the plat noted was "an industrial zoned tract." Booe's sawmill is located on Tract I-1.<sup>191</sup> In 1998, Booe vacated the 1994 plat and submitted a second plat for approval. Booe received comments from the Plan Commission on his second plat, including a note that he should "dedicate County Road 169." The second plat, which included three tracts (Tracts I-1, I-1A, and I-1B) which were noted as being zoned industrial, was also approved by the Plan Commission.<sup>192</sup>

In 1999, Booe sold Tract I-1A to Beckemeyer, who intended to use it for a commercial woodworking operation. Beckemeyer engaged in due diligence before purchasing the tract, including checking the assessors' records, which refer to the tract as "industrial" and obtaining a letter from the Plan Commission, which read in part: "The special exception granted for sawmill in FR zoning, is granted for the property not the owners as per B.C. zoning ordinance and state

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185. 789 N.E.2d 1 (Ind. Ct. App. 2003).

186. *Id.* at 12.

187. *Id.* at 3.

188. *Id.*

189. *Id.*

190. *Id.* at 4.

191. *Id.*

192. *Id.*

statutes. This also allows woodworking in this and any zoning district. This property was given 'FR' zoning in error, the zoning is R-2."<sup>193</sup> Beckemeyer understood this letter to indicate that he would be able to operate pursuant to the special exception granted to Booe in 1976 and that woodworking would be allowed on Tract I-1A. He purchased the tract.<sup>194</sup>

After residential neighbors expressed concern to the Plan Commission, Brown County filed a complaint against Booe and Beckemeyer requesting injunctions to prevent them from operating their sawmill and woodworking operations. Brown County alleged a number of alternative theories which all alleged that the 1976 special exception was no longer valid and that Booe and Beckemeyer were using their respective properties in violation of the Brown County zoning ordinances.<sup>195</sup> Booe and Beckemeyer raised a number of defenses to this complaint, including equitable estoppel. Particularly, they argued that Brown County is estopped from challenging Booe and Beckemeyer's respective industrial uses of their property. The trial court honored this estoppel argument. Brown County appealed.<sup>196</sup>

The court of appeals noted that "government entities are not subject to equitable estoppel" except in special circumstances, namely "estoppel may be appropriate where the party asserting estoppel has detrimentally relied on the government entity's affirmative assertion or on its silence where there was a duty to speak."<sup>197</sup> Apparently in 1976 both Booe and Brown County mistakenly understood Booe's tract to be zoned FR based on its distance from Brown Hill Road when it was actually bordering County Road 169. In 1976, due to inadequate county maps, neither Booe nor Brown County knew that what both thought was a private road running through Booe's property was actually County Road 169.<sup>198</sup> Brown County discovered this fact after it approved Booe's first plat, but before it approved his second plat. Nonetheless, it did not correct Booe's mistaken belief that his property was zoned FR and that his special exception was valid. (Recall that no industrial uses are permissible in a R-2 district, even by special exception.)<sup>199</sup> Under these circumstances, the court found that Booe's defense of equitable estoppel was appropriate:

[G]iven Booe's understandable confusion over the location and existence of County Road 169, and Brown County's affirmative acts and nearly thirty-year silence concerning any possible zoning violation with regard to the location and operation of the sawmill, we agree with Booe that Brown County is estopped from challenging Booe's industrial use of his

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193. *Id.*

194. *Id.*

195. *Id.* at 5.

196. *Id.* at 5-6.

197. *Id.* at 7.

198. *Id.* at 8-9.

199. *Id.* at 9.



property.<sup>200</sup>

With regard to Beckemeyer's defense, the court noted that he attempted to discover whether his use would be permissible on Tract I-1A and that the Plan Commission's actions did not discourage him from that belief. In particular, the court referred to the Plan Commission's confusing letter to Beckemeyer which the court held "could be interpreted by a reasonable person to mean that regardless of whether Tract I-1A is zoned 'FR' or 'R-2,' the special exception applies to that piece of property."<sup>201</sup> Under these circumstances, the court held that Brown County is estopped from challenging Beckemeyer's industrial use of his property.

Finally, the court addressed Beckemeyer's argument that the Plan Commission's approval of Booe's second plat, which designated certain tracts as "zoned industrial," constituted a "de facto rezoning of Tract I-1A to 'industrial.'"<sup>202</sup> The court noted that the Plan Commission does not have statutory authority to rezone land, but has the limited authority to "render decisions concerning and approve plats, replats, and amendments to plats of subdivisions."<sup>203</sup> Therefore, the Plan Commission's approval of the second plat could not constitute a de facto rezoning of the tract. Instead, under the facts and circumstances of this case, the court concluded that Booe and Beckemeyer's current uses are non-conforming uses which Brown County is equitably estopped from preventing.<sup>204</sup>

#### *E. Nature and Enforceability of Zoning Commitments*

In a second Brown County zoning case during this survey period, *Story Bed & Breakfast, L.L.P. v. Brown County Area Plan Commission*,<sup>205</sup> the court of appeals addressed the nature and enforceability of zoning commitments and whether they are or should be treated similarly to standard title exceptions for purposes of "bona fide purchaser" protections.

In 1986, a ten acre parcel of land in unincorporated Brown County (the "Story Property") was zoned as a Planned Unit Development "PUD." The owners at that time entered into a number of land use restrictions designated as "covenants," concerning use of audio equipment, outside lighting, and camping.<sup>206</sup> In 1992, the same owners sought approval for a second PUD for a twelve-acre addition to the Story Property. A similar list of "covenants" were adopted as part of the second PUD. Neither the first PUD, the second PUD, nor the attendant "covenants" were recorded.<sup>207</sup>

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200. *Id.* at 10.

201. *Id.* at 11.

202. *Id.* at 11-12.

203. *Id.* at 12 (quoting IND. CODE § 36-2-4-405 (1997)).

204. *Id.*

205. 789 N.E.2d 13 (Ind. Ct. App. 2003), *petition to trans. pending*.

206. *Id.* at 14-15.

207. *Id.* at 15.

In 1999, Story Bed & Breakfast, L.L.P. ("Story") investigated the Story Property with the intent of purchasing it. Story had a title search conducted, which did not reveal the PUDs or the covenants. However, three months before Story purchased the Story Property, an architect informed Story that the Story Property was zoned pursuant to the 1986 PUD. The architect did not know about the covenants and did not suggest to Story that the property was subject to any land use restrictions.<sup>208</sup> Story invested a significant sum of money in the Story Property and began to use it in a number of ways which violated the 1986 and 1992 PUDs. After purchasing the property, the Plan Commission informed Story about the PUDs and land use restrictions and filed a lawsuit to enforce them. Story claimed that it was a bona fide purchaser for value without notice of the PUDs and therefore the Story Property was not encumbered by the covenants.<sup>209</sup>

The court of appeals began by noting the Indiana statutes which permit local zoning authorities to create PUDs with written "commitments" concerning the use of the land. "Importantly," the court noted, "the terms of such an unrecorded commitment may only be asserted against a subsequent purchaser of real property if the purchaser had actual knowledge of the commitment."<sup>210</sup> The court of appeals discussed in depth whether the land use restrictions attached to the PUDs should be considered "commitments," as they are described by the statute, or "covenants," as they are described by the 1986 and 1992 PUDs. It concluded that such labels are "singularly unhelpful" and that courts should instead "focus on whether a subsequent BFP was given sufficient notice to negate the common law right to the unrestricted use of his or her land."<sup>211</sup>

The court was "troubled that a property owner's common law right to the unrestricted use of his or her property might be encumbered by a condition only discoverable through a search of the minutes of a plan commission meeting."<sup>212</sup> The court continued:

We find it inconsistent that Indiana law requires the terms of conditions to be stated with sufficient clarity as to inform the property owner of the nature of the restrictions inhibiting the use of his or her property and yet would require property owners to search through years of plan commission records for unrecorded land use restrictions outside the recorded chain of title.<sup>213</sup>

Therefore:

[W]e hold that land use restrictions, however denominated, and which result from the PUD negotiation process, should be recorded or otherwise memorialized in a manner reasonably calculated to provide

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208. *Id.*

209. *Id.* at 15-16.

210. *Id.* at 17.

211. *Id.* at 18.

212. *Id.* at 19.

213. *Id.* at 20.



notice to a subsequent purchaser of land. We further hold that the location of such land use restrictions in the minutes of Plan Commission meetings was insufficient to adequately put Story, as a subsequent BFP, on notice of the restrictions contained therein.<sup>214</sup>

Finally, the court addressed whether the fact that Story had been informed about the Story Property's PUD status by the architect prior to purchasing the land put it on notice. The court dismissed that idea:

Having knowledge of a PUD designation is not the same thing as having knowledge of the land use restrictions attached to it. . . . Consequently, causing a property owner's knowledge of a PUD designation to constitute constructive notice of unrecorded or otherwise inadequately memorialized land use restrictions, would require such an owner to review years of plan commission records for information that may or may not exist. We believe this is an unreasonable undertaking that is not adequately ameliorated by vague expectations of accurate and timely advice from associated government land use employees on a county-by-county basis.<sup>215</sup>

It is important to note that the court of appeals opinion suggests that Story made no inquiry with the Plan Commission regarding the zoning of the property before it purchased it. *Story* therefore implies that a potential purchaser will be considered innocent even if does not make any attempt, beyond a title search, to discover if any zoning commitments apply to the property. Because the same reasoning presumably applies, *Story* may be used to argue that any commitments entered into with respect to zoning, not just with respect to PUDs, must be recorded or "otherwise memorialized" in order to be binding on subsequent purchasers.

## V. EMINENT DOMAIN LAW

### A. *Constructive Notice of Eminent Domain Action*

Lake Central School Corporation ("Lake Central") wished to acquire thirty acres (the "Parcel") owned by Hawk Development ("Hawk") in order to build a new elementary school.<sup>216</sup> When Hawk refused to sell the Parcel, Lake Central filed a complaint for condemnation in October 1999. In early 2000, while the condemnation action was pending, Hawk Development sought approval for a subdivision of the Parcel which was approved by the Lake County Plan Commission over Lake Central's objections.<sup>217</sup> In October 2000, while the action was still pending, Hawk Development obtained a loan from Bank Calumet

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214. *Id.*

215. *Id.* at 21-22.

216. *Lake Cent. Sch. Corp. v. Hawk Dev. Corp.*, 793 N.E.2d 1080, 1082 (Ind. Ct. App. 2003), *petition for reh'g pending*.

217. *Id.*

secured by a mortgage on the Parcel and sold several lots to Fetsch Townhomes for development. Hawk Development did not disclose the condemnation action to either Bank Calumet or Fetsch Townhomes and both entities obtained title policies which did not reveal the action.<sup>218</sup> After Bank Calumet, Fetsch Townhomes, and Fifth Third Bank (lender to Fetsch) (collectively, the "Interested Parties") learned of the condemnation proceeding, they sought and were granted permission to intervene, arguing that the current action could not condemn their interests in the Parcel because they had no notice of the action.<sup>219</sup>

Indiana Code section 32-24-1-4(c) provides that the filing of a condemnation complaint constitutes notice of the proceedings to all subsequent purchasers. In this case, the Interested Parties argued that Indiana Code section 32-24-1-4 must be read in concert with the Lis Pendens Act (Indiana Code sections 32-30-11-1 to -10), which requires that a person seeking to place others on constructive notice of a lawsuit concerning real property must file a lis pendens notice with the county recorder.<sup>220</sup> In other words, the Interested Parties argued that despite the clear language of the eminent domain statute, the complaint was not enough to provide constructive notice – a lis pendens notice must also be filed.<sup>221</sup> The Indiana Court of Appeals disagreed and held that no lis pendens notice is required by current law. The court also noted that the eminent domain statute is harsh, and strongly suggested that the General Assembly amend the statute in order to require that lis pendens notices be recorded.<sup>222</sup>

### *B. The Law of Partial Regulatory Takings*

In the late 1960s and the early 1970s, the Property was a landfill for the Town of Georgetown (the "Town").<sup>223</sup> In 1985, the Town sold the Property to Teeter. The Town placed no zoning or other development restrictions on the Property. Teeter applied for and received a building permit and a septic permit from the Town and placed a mobile home on the property, where he lived for several years.<sup>224</sup> In 1996, Teeter sold the Property to the Hertels. The Hertels were aware that the Property had been a landfill, but were unaware of any restrictions on the use of the Property and intended to subdivide it for the construction of homes.<sup>225</sup> In 1996, the Hertels received a construction permit for a private sewage disposal system for the Property. In 1998, Randy and Denise Sewell (the "Sewells") purchased a one acre parcel of the Property for the purpose of building a home for their son Timothy Sewell ("Timothy"), and the

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218. *Id.* at 1083.

219. *Id.*

220. *Id.* at 1084-86.

221. *Id.*

222. *Id.* at 1089.

223. *Town of Georgetown v. Sewell*, 786 N.E.2d 1132, 1135 (Ind. Ct. App. 2003).

224. *Id.*

225. *Id.*



deed transferred ownership directly from the Hertels to Timothy.<sup>226</sup> There was a factual dispute regarding whether the Sewells or Timothy knew that the Property had been used for a landfill. After the purchase, the Sewells applied for and received a permit for a private sewage disposal system from the Floyd County Health Department and a building permit from the Town. After some neighbors called the Town questioning the construction of a home on a former landfill, the Town issued a stop work order.<sup>227</sup> The Sewells and Timothy appealed the stop work order to the Georgetown Board of Zoning Appeals ("BZA"). At the BZA meeting, a former member of the Town Board testified that the Town did not have the Indiana Department of Environmental Management (IDEM) inspect the Property or impose restrictions on the Property at the time of the sale of the Property to Teeter because "everyone on the board at that time, and ninety nine percent of the population knew that was the Town dump."<sup>228</sup> The BZA also heard testimony that it would be unsafe to construct a septic system or residence on the Property because such construction would breach the cover of the landfill. There was testimony that the Property could be used for recreational purposes or grazing purposes and possibly for a slab construction, if fill were brought in so that the cover would not be compromised. The BZA upheld the stop work order and the Sewells filed suit for inverse condemnation.<sup>229</sup> The trial court found that the Sewells had established that a regulatory taking had occurred. The Town appealed.<sup>230</sup>

The Indiana Court of Appeals, relying on *BZA of Bloomington v. Leisz*,<sup>231</sup> stated that there are two types of regulatory takings under the Fifth Amendment to the U.S. Constitution: (1) those that require the owner to suffer a physical "invasion" of his or her property; and (2) those that "deny all economically beneficial or productive use of the land."<sup>232</sup> Because the stop work order fell into the latter category, and because it fell short of eliminating all economically beneficial use, the court applied the test articulated in *Ragucci v. Metropolitan Development Commission*,<sup>233</sup> to determine if a partial regulatory taking had occurred: "Three factors are of 'particular significance' to this ad hoc inquiry: (1) '[t]he economic impact of the regulation on the claimant,' (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations,' and (3) 'the character of the governmental action.'"<sup>234</sup>

Timothy charged that because of the stop work order, his tract diminished in

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226. *Id.*

227. *Id.* at 1136.

228. *Id.*

229. *Id.*

230. *Id.* at 1137.

231. 702 N.E.2d 1026, 1028 (Ind. 1998).

232. *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)).

233. 702 N.E.2d 677, 683 (Ind. 1998) (recognizing a test that originated in *Penn Central Co. v. City of New York*, 438 U.S. 104 (1978)).

234. *Id.*

value from \$14,000 to being "virtually, if not completely, worthless."<sup>235</sup> The court noted that "a landowner is not entitled to the highest and best use of his land; and a taking only occurs when the land use regulation prevents all reasonable use of the land."<sup>236</sup> The Town pointed out that economically viable uses for the tract do exist, namely that Sewell could build a slab type structure like a tool shed, or that he could use the property for recreational or grazing activities.<sup>237</sup> Sewell argued, in response that he could receive "no economic benefit from [the property] being used as a pasture or as a park."<sup>238</sup> The court stated that "We disagree with the notion that tract one has no economically viable use. Timothy can use tract one for grazing or recreational purposes. . . . As such, like the plaintiffs in *Leisz*, Timothy's 'property continues to have an economically viable use, even if it is somewhat diminished.'"<sup>239</sup>

The court next examined whether the stop work order interfered with Timothy's reasonable investment-backed expectations.<sup>240</sup> The court explained that landowners are charged with knowledge of existing ordinances and regulations affecting their property.<sup>241</sup> The court noted that landfills are "heavily regulated for the protection of human health and the environment."<sup>242</sup> Because there is a dispute regarding whether the Sewells knew that the Property had been a landfill, the court implies that the landowner is charged with constructive notice of these regulations even if he had no actual notice that his Property had been a landfill.<sup>243</sup> The court did not raise issues regarding the extent of a landowners' constructive notice of unrecorded restrictions on the use of his property.<sup>244</sup>

Based on the *Penn Central* test, the court found that the stop work order did not constitute a compensable regulatory partial taking of Sewell's property and reversed the trial court's decision.<sup>245</sup>

Timothy apparently did not raise, and the court therefore did not address, the question of whether the Town is equitably estopped from issuing the stop work order because it never imposed any development restrictions on the Property via zoning or recorded restrictions, or whether the Town's failure to place any restrictions on the Property undermined its defense on the takings issue.<sup>246</sup>

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235. *Sewell*, 786 N.E.2d at 1140.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* (citing *Leisz*, 702 N.E.2d at 1030).

240. *Id.* at 1141.

241. *Id.*

242. *Id.*

243. *Id.* at 1141-42.

244. See *Story Bed & Breakfast, L.L.P. v. Brown County Area Plan Comm'n*, 789 N.E.2d 13 (Ind. Ct. App. 2003).

245. *Sewell*, 786 N.E.2d at 1142.

246. See generally *Brown County v. Booe*, 789 N.E.2d 1 (Ind. Ct. App. 2003).



## VI. TAX SALES

The Indiana Court of Appeals addressed tax sales in two opinions during the survey period, clarifying a single issue in each.

In *Lake County Auditor v. Bank Calumet*,<sup>247</sup> Bank Calumet, as trustee of a land trust, purchased an improved parcel of land at the 2000 tax sale in Lake County. Prior to the tax sale, Bank Calumet inspected the property and found the building to be satisfactory.<sup>248</sup> A few months after the sale and before the redemption period had ended, Bank Calumet again visited the property and found that the improvements had been demolished, presumably by the City of Gary. Bank Calumet filed a verified petition for rescission of the tax sale certificate and for a refund, asking the circuit court to cancel the tax sale for equitable reasons.<sup>249</sup> The circuit court granted relief to Bank Calumet and ordered the Lake County Auditor to refund Bank Calumet's money. The Auditor appealed.<sup>250</sup>

The court of appeals noted that "Indiana appellate courts have recognized that the doctrine of *caveat emptor* applies to tax sales in its fullest force, that is, a purchaser at a tax sale buys at his own risk."<sup>251</sup> Noting that Bank Calumet did not allege that the Auditor misled the buyer about the status of the property and that no statute provides Bank Calumet with the remedy of obtaining a rescission of the sale under such circumstances, the court of appeals reversed the trial court and held that Bank Calumet had assumed the risk that the "nature or extent of the property he purchased [would be] altered by a third party between the time of the tax sale and expiration of the redemption period."<sup>252</sup>

In *Board of Commissioners v. Mundy*,<sup>253</sup> Mundy purchased an improved parcel of real estate at the 2002 tax sale. He sent the required notice to all persons with a substantial property interest in compliance with Indiana Code section 6-1.1-25-4.5.<sup>254</sup> A few weeks after the tax sale, Mundy received notice from the City of Evansville Department of Code Enforcement stating that it had issued an order that Mundy must raze the improvements on the real estate by July 10, 2002.<sup>255</sup> Mundy filed a complaint in superior court, arguing that he was entitled to a refund of his purchase price, minus a twenty-five percent penalty under Indiana Code section 6-1.1-25-4.6(d). The trial court held that Mundy was entitled to such a refund. The Board appealed.<sup>256</sup>

Mundy did not contest the fact that he did not petition the court to issue a tax deed at the end of the redemption period or send out the notices of that petition

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247. 785 N.E.2d 279 (Ind. Ct. App. 2003).

248. *Id.* at 280.

249. *Id.*

250. *Id.*

251. *Id.* at 281.

252. *Id.* at 284 n.5.

253. 783 N.E.2d 742 (Ind. Ct. App. 2003), *trans. denied*.

254. *Id.* at 743.

255. *Id.*

256. *Id.*

as required by Indiana Code section 6-1.1-25-4.6.<sup>257</sup> Nonetheless, he argued, and the court of appeals agreed, that the following provision applied to his case: “[i]f the court refuses to enter an order directing the county auditor to execute and deliver the tax deed because of the failure of the purchaser or purchaser’s assignee to fulfill the requirements of this section, the court shall order the return of the purchase price minus a penalty of twenty-five percent (25%) of the amount of the purchase price.”<sup>258</sup> The Board argued that the word “failure” implied that the purchaser was required to make a bona fide effort to comply with the requirements of the statute before it could be entitled to a refund.<sup>259</sup> The court disagreed, noting that “[i]t is not unreasonable to say that someone fails to meet these requirements when he chooses not to do them.”<sup>260</sup> The decision of the trial court was affirmed.<sup>261</sup>

## VII. DEVELOPMENTS IN THE COMMON LAW OF PROPERTY

### A. *Adverse Possession*

The Kings purchased a landlocked tract of land in 1982 and, in the original deed, received a twenty-foot wide access easement purportedly over land retained by the sellers.<sup>262</sup> In 1996, the Kings decided to build a driveway in the easement and contracted with a surveyor to perform a “legal survey” under Indiana Code section 36-2-12-10(b).<sup>263</sup> Notice was given to the Wileys and to Harden, whose property abutted the easement parcel. The surveyor found, and indicated on the recorded legal survey, that the easement parcel overlapped with real estate to which the Wileys and Harden purportedly had title.<sup>264</sup> The Wileys initiated an appeal of the legal survey along with a complaint seeking a declaration of the boundaries of the easement parcel. The Kings filed a counterclaim to quiet title as to their easement rights.<sup>265</sup> The trial court ruled that the legal survey was void because the Kings were not the landowners of property adjacent to the easement parcel and, therefore, the surveyor had no jurisdiction to perform the survey under the statute.<sup>266</sup> The trial court further determined that the Wileys and Harden had adversely possessed any interest that the Kings had in the easement parcel. The Kings appealed.<sup>267</sup>

The court of appeals reversed and remanded, holding that: (1) the Kings were

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257. *Id.* at 744.

258. *Id.* (citing IND. CODE ANN. § 6-1.1-25-4.6(d) (West 2000 & Supp. 2003)).

259. *Id.*

260. *Id.*

261. *Id.* at 745.

262. *King v. Wiley*, 785 N.E.2d 1102 (Ind. Ct. App. 2003), *trans. denied*.

263. *Id.* at 1106.

264. *Id.*

265. *Id.*

266. *Id.* at 1107.

267. *Id.*



“landowners” as that term is used in section 36-2-12-10(b) and therefore had the authority to order the legal survey;<sup>268</sup> and (2) the Wileys and Harden did not adversely possess the easement parcel.<sup>269</sup> Using the standard analysis, the court noted that the encroachment of the Wileys and Harden into the easement parcel was not so open, notorious, or hostile as to give the Kings (or the underlying fee owner) notice of their adverse possession.<sup>270</sup> Finally, the court of appeals ruled that the Kings did not provide all adjacent landowners with the notice required by the legal survey statute and declined to use the survey to determine the easement boundaries as a matter of law. The case was remanded to determine the boundaries of the easement parcel.<sup>271</sup>

### *B. Prescriptive Easement*

The Corporation for General Trade (“CGT”) owns Lots 1, 2 and 4 in Krumbhaar’s Subdivision in Terre Haute.<sup>272</sup> Sears owns Lots 3, 5, 6, 11 and 12.<sup>273</sup> In 1977, the Sanitary District of the City of Terre Haute (the “District”) condemned a portion of Lots 1, 2, 3, and 4 for the purpose of constructing a drainage ditch and dam across Lots 2, 3, and 4, which flooded a portion of the aforementioned lots, including the private road by which Lot 4 accessed the public road.<sup>274</sup> CGT’s predecessor in interest began using the dam road in 1977 to access Lot 4. A locked gate was installed on the road and only the District and CGT’s predecessor had keys.<sup>275</sup>

In the late 1990s, issues arose between CGT and Sears regarding access to and control of the dam road. Sears requested a key to the gate and was denied by CGT.<sup>276</sup> Sears then constructed a cable barrier across Lot 3 to prevent access between Lot 4 and the public road.<sup>277</sup> CGT filed suit, claiming that it had obtained a prescriptive easement over the dam road. Sears counterclaimed, arguing that he too had a prescriptive easement over the dam road. Both parties sought injunctions to prevent the other party from blocking its access to the dam road.<sup>278</sup>

The trial court found that both Sears and CGT had established prescriptive easements over the dam road.<sup>279</sup> CGT appealed. Sears did not appeal the trial

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268. *Id.* at 1108.

269. *Id.*

270. *Id.* at 1110.

271. *Id.*

272. *Corp. for Gen. Trade v. Sears*, 780 N.E.2d 405, 406-07 (Ind. Ct. App. 2002).

273. *Id.* at 408.

274. *Id.* at 407.

275. *Id.*

276. *Id.* at 409.

277. *Id.*

278. *Id.*

279. *Id.*

court's finding of a prescriptive easement in favor of CGT.<sup>280</sup> The Indiana Court of Appeals laid out the common law test for prescriptive easements and stressed that the test is strictly applied.<sup>281</sup> It found that the evidence presented by Sears at trial was insufficient to establish several of the required facts, including a twenty-year period of continuous use.<sup>282</sup> Particularly, the court noted that the trial court inferred actual use for a period of four years based on the circumstantial evidence presented by Sears. This, the trial court was not permitted to do: "Such an inference does not comport with the stringent requirements mandated for establishing a prescriptive easement."<sup>283</sup>

The court also addressed a "Flowage Easement" granted by the District to Sears in 1998 for the purpose of granting Sears access to his Lots 2 and 4 through the dam road.<sup>284</sup> The court found that the easement condemned by the District was not broad enough to give it the right to grant access rights through its easement to "non-governmental third parties who had nothing to do with constructing or maintaining the dam but simply sought to use the right-of-way for access to adjacent land."<sup>285</sup> As a result, the District lacked the legal right to grant the Flowage Easement to Sears and the court dismissed it as "null and void."<sup>286</sup>

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280. *Id.*

281. *Id.* at 410.

282. *Id.* at 411.

283. *Id.* at 412.

284. *Id.*

285. *Id.* at 413.

286. *Id.*



# RECENT DEVELOPMENTS IN INDIANA TAXATION

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## INTRODUCTION

The 113th General Assembly, the Governor of Indiana, the Indiana Supreme Court, and the Indiana Tax Court contributed changes to the Indiana tax laws in 2002. This Article highlights the major developments that occurred throughout the year.<sup>1</sup> Whenever the term “General Assembly” is used in this Article, such term shall refer only to the Indiana General Assembly. Whenever the term “State Board” is used in this Article, such term shall refer only to the Indiana State Board of Tax Commissioners. Whenever the term “Indiana Board” is used in this Article, such term shall refer only to the Indiana Board of Tax Review. Whenever the term “Department” is used in this Article, such term shall refer only to the Indiana Department of State Revenue. Whenever the term “Tax Court” is used in this Article, such term shall refer only to the Indiana Tax Court.

## I. INDIANA GENERAL ASSEMBLY LEGISLATION

The 113th Indiana General Assembly passed a number of legislative changes affecting Indiana taxpayers. Many of these changes were executed to fine-tune existing tax laws. Significant policy changes occurred in the following major areas of taxation: gaming taxes; utility receipts tax; sales and use tax; state and local income taxes; inheritance tax; financial institution tax; special fuel tax; aircraft license excise tax; tobacco products taxes; tax administration; innkeepers’ tax; and, various other provisions.

### A. Gaming Tax

The General Assembly redefined a marketing sheet used in charity gaming as additional information published about a wagering game that describes winnings<sup>2</sup> and required the marketing sheets to be maintained for the lesser of either six years or until the end of an audit in which such marketing sheets may be audited.<sup>3</sup> Similarly, radio advertisements announcing charity gaming events are required to announce the name of the qualified organization conducting the

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1. For comprehensive information concerning the Indiana Tax Court, the Indiana Department of State Revenue, the Indiana State Board of Tax Commissioners, and a variety of other tax-related information, visit the Access Indiana website at <http://www.accessindiana.org>.

2. IND. CODE § 4-32-6-16.5 (eff. July 1, 2003).

3. See *id.* § 4-32-13-6 (eff. July 1, 2003).

event along with that organization's license number.<sup>4</sup>

A licensed Indiana manufacturer or distributor is now required to provide the Department with a list of any bingo supplies, punchboards, or tip boards that are destroyed, discontinued, or rendered unusable.<sup>5</sup> This list must include the quantity, description, and serial number of any items destroyed as well as the date upon which such items were destroyed. However, defective items are not to be listed therein.<sup>6</sup> As a filing requirement, a licensed Indiana manufacturer or distributor is required to file a quarterly report with the Department listing their sales of supplies, devices, and equipment.<sup>7</sup>

It is now provided that the Indiana Administrative Orders and Procedures Act applies to protests and hearings to charity gaming held by the Department.<sup>8</sup> The General Assembly also required that all manufacturers or distributors provide the Department with any requested records within 72 hours of such request.<sup>9</sup>

In addition, the General Assembly clarified that the excise tax imposed on gaming card sales of qualified organizations is to be 10% of the purchase price paid by that organization for pull tabs, punchboards, and tip boards,<sup>10</sup> and that the gaming card excise tax is to be imposed upon the licensed distributor at the time when the supplies are actually distributed in Indiana.<sup>11</sup>

The General Assembly further provided that if any employee or officer of a licensed manufacturer or distributor is a member of a civic or religious organization which holds a charity gaming license, that membership may not be construed as an affiliation with the organization's charity gaming operations.<sup>12</sup>

Changes were also made to the riverboat gaming tax law. For example, the riverboat admissions taxes were raised in Orange County to four dollars (\$4.00) per admission,<sup>13</sup> and a riverboat which implements flexible scheduling during a fiscal year must now calculate its gaming tax liability from June 30, 2002 instead of from the time at which the flexible scheduling is actually implemented.<sup>14</sup> To compensate for this change, two adjusting payments will be due in two equal installments on July 1, 2003 and July 1, 2004.<sup>15</sup> Similarly, if a riverboat eliminates flexible scheduling during a fiscal year, then the gaming tax liability must be calculated as though flexible scheduling were in effect until the end of that fiscal year.<sup>16</sup>

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4. *See id.* § 4-32-9-35 (eff. July 1, 2003).

5. *See id.* § 4-32-13-7 (eff. July 1, 2003).

6. *Id.*

7. *See id.* § 4-32-13-8 (eff. July 1, 2003).

8. *See id.* § 4-32-8-5.

9. *See id.* § 4-32-13-8 (eff. July 1, 2003).

10. *See id.* § 4-32-15-1 (eff. July 1, 2003).

11. *See id.* § 4-32-15-2 (eff. July 1, 2003).

12. *See id.* § 4-32-9-35 (eff. July 1, 2003).

13. *See id.* § 4-33-12-1 (eff. July 1, 2003).

14. *See id.* § 4-33-13-1.5 (retroactive to July 1, 2002).

15. *Id.*

16. *Id.*



### *B. Utility Receipts Tax*

The General Assembly corrected an erroneous reference to the definition of the term “political subdivision” as well as various references to repealed gross income tax sections.<sup>17</sup> Also, the section for underpayment of the estimated utility receipt taxes now provides that payments must be at least 20% of the final tax liability for the current taxable year or 25% of the tax liability for the previous year in order to avoid a penalty.<sup>18</sup> Similarly, the penalty for underpayment is to be calculated separately from the penalty for underpayment of the adjusted gross income tax.<sup>19</sup> The General Assembly also clarified that gross receipts received by a political subdivision for sewer and sewage services are exempt from the utility receipts tax.<sup>20</sup>

### *C. Sales and Use Tax*

The General Assembly made a number of clarifications of definitions and provided several new definitions to the sales and use tax law with respect to gross retail income, alcoholic beverages, candy, computers and computer software, dietary supplements, drugs, durable medical equipment, food and food ingredients, mobility enhancing equipment, prewritten computer software, prosthetic devices, and soft drinks. In making such clarifications, most of the following definitions make it clearer what types of property will be subject to the sales and use taxes and simplify the multi-state sales and use tax agreement, the “Streamlined Sales Tax Project”.<sup>21</sup> Additionally, the General Assembly eliminated a reference to the gross income tax section of the Indiana Code that has been repealed.<sup>22</sup>

1. *Delivery Charges*.—Delivery charges and charges by a seller for the preparation and delivery of property to a location designated by a purchaser are now included in gross retail income.<sup>23</sup> These charges include, for example, transportation, shipping, postage, handling, crating, and packing.<sup>24</sup> However, coupons or other discounts that are allowed against such charges and are not reimbursed by third parties are not a part of gross retail income.<sup>25</sup>

2. *Food and Other Ingested Goods*.—Now, “food and food ingredients” are defined as substances sold for ingestion or chewing by humans and that are

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17. See *id.* § 6-2.3-1-12 (retroactive to Jan 1, 2003).

18. See *id.* § 6-2.3-6-1 (retroactive to Jan 1, 2003).

19. See *id.* § 6-3-4-4.1 (eff. April 2, 2003).

20. See *id.* § 6-2.3-4-3 (retroactive to Jan 1, 2003).

21. For comprehensive information concerning the Streamlined Sales Tax Project, visit the Project’s website at <http://www.streamlinedsalestax.org>.

22. See IND. CODE § 6-2.5-6-13 (retroactive Jan., 2003).

23. See *id.* § 6-2.5-4-1 (eff. Jan. 1, 2004).

24. *Id.*

25. See *id.* § 6-2.5-1-5 (eff. Jan. 1, 2004).

consumed for their taste or nutritional value.<sup>26</sup> However, the term does not include alcoholic beverages, candy, dietary supplements, or soft drinks. "Alcoholic beverages" are defined as beverages containing one-half of one percent or more alcohol by volume.<sup>27</sup> "Candy" is defined to be the preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts or other ingredients or flavorings in the form of bars, drops, or pieces. However, the term does not include items containing flour or items requiring refrigeration.<sup>28</sup> "Dietary supplements" are defined as a product that is intended to supplement the diet, contains a vitamin, mineral, herb, amino acid, or other supplement, and is required to be labeled as a dietary supplement, identifiable by the "Supplemental Facts" box on the label and as required under 21 CFR 101.36.<sup>29</sup> However, dietary supplements do not include tobacco products.<sup>30</sup> "Soft drinks" are defined as nonalcoholic beverages containing natural or artificial sweeteners.<sup>31</sup> However, soft drinks do not include beverages containing milk or milk products, soy, rice, or similar milk substitutes or greater than 50% of vegetable or fruit juice by volume.<sup>32</sup>

3. *Computers and Computer Software*.—The term "computer" is defined as an electronic device that accepts information in digital or similar form and manipulates the information for a result based on a sequence of instructions.<sup>33</sup> "Computer software is" defined as a set of coded instructions which is designed to cause a computer or automatic data processing equipment to perform a task.<sup>34</sup> The term "delivered electronically" is defined as delivered to the purchaser by means other than tangible storage media.<sup>35</sup> The term "prewritten computer software" is defined as computer software "not designed and developed by the author or other creator to the specifications of a specific purchaser."<sup>36</sup> Where there is a separate invoice or other statement of the price given to the purchaser for a modification or enhancement, the modification or enhancement is not prewritten computer software.<sup>37</sup> However, prewritten computer software does include any of the following: combinations of two or more prewritten computer software programs or prewritten parts of the programs; software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the purchaser; prewritten computer software or a prewritten part of the software that is modified or

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26. *Id.* § 6-2.5-1-20 (eff. Jan. 1, 2004).

27. *Id.* § 6-2.5-1-11 (eff. Jan. 1, 2004).

28. *Id.* § 6-2.5-1-12 (eff. Jan. 1, 2004).

29. *Id.* § 6-2.5-1-16 (eff. Jan. 1, 2004).

30. *Id.*

31. *Id.* § 6-2.5-1-26 (eff. Jan. 1, 2004).

32. *Id.*

33. *Id.* § 6-2.5-1-13 (eff. Jan. 1, 2004).

34. *Id.* § 6-2.5-1-14 (eff. Jan. 1, 2004).

35. *Id.* § 6-2.5-1-15 (eff. Jan. 1, 2004).

36. *Id.* § 6-2.5-1-24 (eff. Jan. 1, 2004).

37. *Id.*



enhanced to any degree, where the modification or enhancement is designed and developed to the specifications of a specific purchaser.<sup>38</sup> Further, for modified or enhanced computer software with respect to which the programmer is not the author or creator, the person is considered to be the author to the extent of the modifications or enhancements.<sup>39</sup>

4. *Drugs and Medical Devices*.—The term “drug” is defined as any substance recognized in the United States Pharmacopoeia as being intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease, or which is intended to affect the structure or any function of the body. However, the term does not include food or food ingredients, dietary supplements, or alcoholic beverages as defined above.<sup>40</sup> The term “prescriptions” are defined as an order or formula issued by a licensed practitioner.<sup>41</sup> “Durable medical equipment” is defined as equipment and repair and replacement parts for equipment that: can stand repeated use; is used to serve a medical purpose; generally is not useful to a person in the absence of illness or injury; and, is not worn in or on the body.<sup>42</sup> A “prosthetic device” is defined as a replacement, corrective, or supportive device worn on or in the body to artificially replace a missing part of the body, prevent or correct physical deformity, or support a weak or deformed part of the body.<sup>43</sup> “Mobility enhancing equipment” is defined as equipment primarily used to provide or increase the ability to move from one place to another and is not generally used by persons with normal mobility; however, it does not include a motor vehicle or equipment on a motor vehicle.<sup>44</sup>

5. *Tangible Personal Property*.—“Tangible personal property” is defined as something that can be seen, weighed, measured, felt, or touched or in any other manner is perceptible to the senses including, but not limited to, electricity, gas, water, steam, and prewritten computer software.<sup>45</sup> The term “lease and rental” was defined as any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration and may include future options to purchase or extend. However, the term does not apply to secured financing agreements, purchase money mortgages, or the equipment requiring as a necessity an operator performing more than maintenance, inspections, or setting up the equipment.<sup>46</sup> Similarly, the General Assembly provided that subleasing is not classified as the rental or leasing of tangible personal property.<sup>47</sup>

6. *Calling Services*.—“Post paid calling services” are defined as telecommunications services obtained by making a payment on a call-by-call

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38. *See id.*

39. *Id.*

40. *See id.* § 6-2.5-1-17 (eff. Jan. 1, 2004).

41. *Id.* § 6-2.5-1-23 (eff. Jan. 1, 2004).

42. *See id.* § 6-2.5-1-18 (eff. Jan. 1, 2004).

43. *See id.* § 6-2.5-1-25 (eff. Jan. 1, 2004).

44. *See id.* § 6-2.5-1-22 (eff. Jan. 1, 2004).

45. *Id.* § 6-2.5-1-27 (eff. Jan. 1, 2004).

46. *See id.* § 6-2.5-1-21 (eff. Jan. 1, 2004).

47. *See id.* § 6-2.5-4-10 (eff. Jan. 1, 2004).

basis either through the use of a credit card, debit card or similar bankcard, or by charge made to a telephone number that is not associated with the origination or termination of the telecommunications service.<sup>48</sup> "Prepaid calling service" is defined as the right to access exclusively telecommunications services, which must be paid for in advance and which enables the origination of calls using an access number or authorization code, whether manually or electronically dialed, and that is sold in predetermined units or dollars of which the number declines with use in a known amount.<sup>49</sup>

7. *Exemptions.*—In order to comply with the new additions and clarifications made to the sales and use tax definitions, the General Assembly made some technical changes to the exemptions and deductions under the sales and use taxes.

The agricultural exemption for the production of food now includes the production of food ingredients so long as the double direct test is met and the property is directly used in the direct production of food ingredients and the person acquiring the property is occupationally engaged in producing food ingredients.<sup>50</sup> Similarly, the General Assembly exempted from the sales tax food and food items which are sold without eating utensils provided that the seller of such items has a primary NAICS classification as a food manufacturer and is not a bakery.<sup>51</sup> The General Assembly excluded from this exemption the following: candy, alcoholic beverages, soft drinks, food sold through a vending machine, food sold in a heated state or heated by the seller, two or more food ingredients mixed or combined by the seller for sale as a single item,<sup>52</sup> and food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws.<sup>53</sup>

The General Assembly clarified that both the purchase of durable medical equipment and prosthetic devices and the rental of durable medical equipment and other medical supplies are exempt from the sales tax.<sup>54</sup> With respect to the exemption for legend and non-legend drugs, the General Assembly made a technical change only.<sup>55</sup>

In addition to the changes made to the exemptions provided for in the areas of agriculture, food and food production, and drug and medical equipment, the General Assembly also provided that the purchase of a new motor vehicle by one franchisee for the purpose of resale to another dealer franchise of the same

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48. See *id.* § 6-2.5-12-10 (eff. Jan. 1, 2004).

49. *Id.* § 6-2.5-10-11 (eff. Jan. 1, 2004).

50. See *id.* § 6-2.5-5-1 Version b (eff. Jan. 1, 2004).

51. See *id.* § 6-2.5-5-20 Version a (eff. Jan. 1, 2004).

52. This does not include "food that is only cut, repackaged, or pasteurized by the seller, eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the federal Food and Drug Administration in chapter 3, subpart 3-401.11 of its Food Code so as to prevent food borne illnesses." *Id.*

53. *Id.* (not including packaging used to transport the food).

54. See *id.* § 6-2.5-5-19 Version a, Version b (eff. Jan. 1, 2004).

55. See *id.* § 6-2.5-5-19 (eff. Jan. 1, 2004).



vehicle trade name is exempt from the sales and use tax.<sup>56</sup> This same change exempts purchases of new motor vehicles by a franchisee when such vehicles are either purchased directly from the manufacturer or are purchased for the rental or leasing in that individual's ordinary course of business.<sup>57</sup>

8. *Deductions.*—Similar to the changes made for exemptions to the sales and use taxes, the General Assembly added a provision to the bad debt deduction allowed against the sales and use taxes. The changes provide that the bad debt deduction does not include interest on the debt and that the amount of the deduction is to be determined in the manner which is provided by Section 166 of the Internal Revenue Code for bad debts. However, the deduction is to be adjusted in order to exclude: financing charges or interest; sales or use taxes charged on the purchase price; uncollectible amounts on property that remain in the possession of the seller until the full purchase price is paid; expenses incurred in attempting to collect any debt; and, repossessed property.<sup>58</sup> The bad debt deduction must be claimed in the period for which the receivable was written off and an individual may receive the deduction even if they are not required to file a federal income tax return.<sup>59</sup> If the amount of the bad debt deduction exceeds an retail merchant's taxable sales for a taxable period then the retail merchant is entitled to file for a refund pursuant to Indiana Code section 6-8.1-9. However, the deadline for such return will be tolled from the due date of the return in which period the uncollectible could have first been claimed.<sup>60</sup> Certified service providers assuming a retail merchant's filing responsibilities may claim, on behalf of the merchant, the bad debt deduction or refund, and in such a case, the credit or refund to the merchant is to be the entire amount deducted or refunded.<sup>61</sup> Payments received on a previously claimed uncollectible receivable is to be first be applied proportionally to the taxable price of the property and the state gross retail tax or use tax thereon, and second, to interest, service charges, and any other charges.<sup>62</sup> Finally retail merchants claiming the bad debt deduction for uncollectible receivables may allocate that receivable among the states<sup>63</sup> which are members of the Streamlined Sales and Use Tax Agreement if the books and

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56. *See id.* § 6-2.5-5-8 (eff. July 1, 2003).

57. *Id.*

58. *Id.* § 6-2.5-6-9 (eff. Jan. 1, 2004).

59. *See id.*

60. *See id.*

61. *See id.*

62. *Id.*

63. Currently there are 41 participating states as well as the District of Columbia. The participating states are Alabama, Arizona, Arkansas, California, Connecticut, District of Columbia, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

records of the retail merchant support that allocation.<sup>64</sup>

9. *Sourcing Rules*.—The General Assembly provided a number of changes aimed at clarifying the sourcing rules for retail merchants involved in retail transactions both within and outside of Indiana.

a. *Service provider of state*.—A section was added to the Indiana Code which provides that the Department of Administration and each purchasing agent for a state educational institution is to provide the Department with a list of every person who wants to enter into a contract to sell property or services to an agency or a state educational institution.<sup>65</sup> The Department is to notify the Department of Administration or the purchasing agent of the state educational institution if a person on the list does not have a registered retail merchant certificate or is delinquent in remitting or paying amounts due to the Department under this article.<sup>66</sup>

Similarly, the General Assembly provided that any person who enters into a contract to provide property or services, or agrees to sell property to an agency or an institution of higher education is required to file an application for a retail merchant's certificate with the Department and thereby consents to be treated as if the person has a place of business in Indiana and will be further required to collect and remit the sales tax as provided by the statute.<sup>67</sup>

b. *Call center operators*.—The General Assembly added a new section to the Indiana Code which provides that a person who has contracted with a call center operator for a telephone service does not have a duty to register as a retail merchant or to collect or remit sales tax if that individual's only tangible or intangible property within Indiana is located at the premises of the call center operator, is used to provide or assist directly with the provision of a telephone service as described in subsection (c), and not held for sale, shipment, or distribution in response to orders received as a result of a telephone service provided by the call center operator.<sup>68</sup> Further, any activities of any kind which are performed by or on behalf of the individual or performed by the call center operator, are not considered to be, or to create, an office, a place of distribution, a sales location, a sample location, a warehouse, a storage place, or other place of business maintained, occupied, or used in any way by the person.<sup>69</sup> Similarly, a call center operator with which a person has contracted for a telephone service is not be considered to be in any way a representative, an agent, a salesman, a canvasser, or a solicitor for the person.<sup>70</sup>

c. *Telecommunications services*.—As for the sourcing rules for telecommunications services, the General Assembly created an entire chapter

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64. See IND. CODE § 6-2.5-6-9 (eff. Jan. 1, 2004).

65. See *id.* § 6-2.5-4-14 (eff. July 1, 2003).

66. See *id.*

67. See *id.* § 6-2.5-8-10 (eff. July 1, 2003).

68. See *id.* § 6-2.5-8-12 (eff. July 1, 2003).

69. *Id.*

70. *Id.* (For purposes of this section, a telephone service includes soliciting orders by telephone, accepting orders by telephone, and making and receiving any other telephone calls.) *Id.*



devoted to determining the appropriate source for the imposition of the sales tax. Telecommunications services sold on a call-by-call basis will be sourced at each level of taxing jurisdiction where the call originates and terminates or at each level of taxing jurisdiction where the call either originates or terminates and in which the service address is also located.<sup>71</sup> Telecommunications services sold on a basis other than a call-by-call basis are sourced to the customer's place of primary use.<sup>72</sup> However, mobile telecommunications, post paid and pre-paid calling services, and private communications services, whether sold on a call-by-call basis or otherwise, will have their own sourcing rules. The sales of mobile telecommunications services, other than air to ground radiotelephone service and prepaid calling service, is sourced to the customer's place of primary use as required by the Mobile Telecommunications Sourcing Act and Indiana Code section 6-8.1-15.<sup>73</sup> Sales of post paid calling services are sourced to the origination point of the telecommunications signal as first identified by either the seller's telecommunications system or information received by the seller from its service provider where the system used to transport such signals is not that of the seller.<sup>74</sup> Sales of prepaid calling services are sourced in the following manner. When the service is received by the purchaser at a business location of the seller, the sale is sourced to that business location. Otherwise the sale is sourced to the location where receipt by the purchaser occurs.<sup>75</sup> Sales of private communications services are sourced as follows. Service for a separate charge related to a customer channel termination point is sourced to each level of jurisdiction in which such customer channel termination point is located. Services located entirely in one jurisdiction are sourced to that jurisdiction; services between two jurisdiction are sourced 50% to each level of jurisdiction; and for services sourced in more than one jurisdiction the sales are sourced in each jurisdiction based on the percentage determined by dividing the number of customer channel termination points in such jurisdiction by the total number of customer channel termination points.<sup>76</sup>

*d. General personal property and services.*—The General Assembly added a section to the Indiana Code to define the sourcing rules for the retail sale, lease, or rental of general personal property and services excluding the retail sale or transfer of watercraft, modular homes, manufactured homes, or mobile homes, and the retail sale only, i.e. not excluding the lease or rental, of motor vehicles, trailers, semi trailers, or aircraft that do not qualify as transportation equipment.<sup>77</sup> Specifically, the General Assembly provided that the retail sales of general personal property and services, excluding the above mentioned exclusions, will be sourced as follows. A product which is received by a purchaser at a business

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71. See *id.* § 6-2.5-12-14 (eff. Jan. 1, 2004).

72. See *id.* § 6-2.5-12-15 (eff. Jan 1, 2004).

73. See *id.* § 6-2.5-12-16 (eff. Jan. 1, 2004).

74. *Id.*

75. *Id.*

76. See *id.*

77. See *id.* § 6-2.5-13-1 (eff. Jan. 1, 2004).

location of the seller will be sourced to that business location.<sup>78</sup> Products which are not received at the seller's business location will be sourced to the location where the purchaser received the property or service.<sup>79</sup> When the first two provisions fail to provide a sourcing location the sale will be sourced to the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith.<sup>80</sup> If the previous three provisions are unsuccessful in establishing a sourcing location the sale will be sourced to the location indicated by an address for the purchaser obtained during the consummation of the sale, including the address of a purchaser's payment instrument, if no other address is available, when use of this address does not constitute bad faith.<sup>81</sup> When none of the previous provisions apply the location will be determined by the address from which property was shipped.<sup>82</sup>

For the lease or rental of property other than motor vehicles, trailers, semi-trailers, or aircraft that do not qualify as transportation equipment the sourcing that requires recurring periodic payments, the first periodic payment is sourced the same as a retail sale; and subsequent periodic payments will be sourced to the primary property location for each period covered by the payment.<sup>83</sup> For a lease or rental not requiring recurring periodic payments, the payment is sourced the same as a retail sale as provided above.<sup>84</sup> The lease or rental of motor vehicles, trailers, semi-trailers, or aircraft that do not qualify as transportation equipment requiring periodic payments will be sourced to the primary property location.<sup>85</sup> A lease or rental not requiring recurring periodic payments will be sourced the same as a retail sale as provided above.<sup>86</sup> Similarly, the retail sale, including lease or rental, of transportation equipment will be sourced the same as a retail sale as provided above.<sup>87</sup>

*e. Multiple points of use.*—The General Assembly provided an exemption for a multiple point of use exemption ("MPU exemption") for digital goods, computer software delivered electronically, or services that are to be available for use concurrently in multiple jurisdictions.<sup>88</sup> The MPU exemption applies to a business purchaser who is not the holder of a direct pay permit and knows at the time of its purchase that one of the above mentioned categories will be

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78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *See id.* § 6-2.5-13-2 (eff. Jan. 1, 2004).



available in more than one jurisdiction.<sup>89</sup> The MPU exemption requires that a business purchaser with this knowledge is to deliver to the seller in conjunction with its purchase a form disclosing the MPU exemption, the effect of which will relieve the seller of all obligation to collect, pay, or remit the applicable tax and transfer such obligation on a direct pay basis.<sup>90</sup> A purchaser is allowed to use any consistent and uniform method of apportionment so long as such method is supported by that purchaser's business records as they exist at the time of the sale.<sup>91</sup> Any initial MPU exemption form remains in effect as to all future sales by the seller to the purchaser until such time as the form is revoked in writing.<sup>92</sup>

*f. Direct mailer.*—Similar in some respects to the MPU exemption, the General Assembly provided that a purchaser of direct mail that is not a holder of a direct pay permit is to provide to a seller in conjunction with the purchase either a direct mail form or information to show the jurisdictions to which the direct mail is delivered to recipients.<sup>93</sup> Much like the MPU exemption, the direct mail form relieves the seller of the obligation to pay, collect, or remit the applicable tax and transfers the duty upon the purchaser to remit the applicable tax on a direct pay basis.<sup>94</sup> However, if the purchaser provides the seller with information indicating the jurisdictions in which mail is to be delivered to recipients, then the seller retains the obligation to collect the tax according to such information.<sup>95</sup> Similarly, a direct mail form, once provided, is effective as to all future sales until such time as it is revoked in writing.<sup>96</sup>

*g. Hotel comps.*—For retail merchants who furnish rooms or lodgings to individuals on a complimentary basis for less than thirty days at a location where lodgings are regularly furnished for consideration, the General Assembly requires that the merchant now compute its gross retail income as being inclusive of the gross retail income that would have been received from renting a comparable room or lodging on the date the complimentary room or lodging is provided.<sup>97</sup> Similarly, the retail tax is to be imposed upon such complimentary transactions.<sup>98</sup>

As a filing requirement, the General Assembly requires that a retail merchant providing complimentary hotel rooms report to the Department, in addition to their sales tax return, a report listing the number of rooms or lodgings rented during the reporting period and the total amount of state gross retail taxes remitted with respect to the rooms or lodgings, and the number of complimentary rooms or lodgings provided during the reporting period and the total amount of

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89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.* § 6-2.5-13-3 (eff Jan. 1, 2004).

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.* § 6-2.5-4-4.5 (eff. Jan. 1, 2004).

98. *See id.*

state gross retail taxes remitted with respect to those rooms or lodgings.<sup>99</sup>

#### *D. State and Local Income Tax*

1. *Adjusted Gross Income*.—The General Assembly eliminated reference to the gross income tax which was repealed in 2003 and incorporated reference changes contained within P.L. 1-2003.<sup>100</sup> Similarly, the General Assembly updated the Indiana Code sections providing for the Indiana Adjusted Gross Income to correspond to the federal definition of adjusted gross income as provided in the Internal Revenue Code.<sup>101</sup> However, as an exception to this update, the bonus depreciation deduction (of 30% and 50%) for property placed in service after September 11, 2001 was excluded as it applies to individuals, corporations, trusts and estates, life insurance companies, and insurance companies.<sup>102</sup> Similarly, the General Assembly added a definition for bonus depreciation to mean any depreciation allowance allowed in computing the taxpayer's federal adjusted gross income or federal taxable income that is attributable to the additional first-year special depreciation allowance (bonus depreciation) for qualified property allowed under Section 168(k) of the Internal Revenue Code.<sup>103</sup>

The General Assembly established that employees of pass through entities are entitled to claim the enterprise zone employee tax deduction if they live and work within the enterprise zone.<sup>104</sup> It also clarified that a lottery prize payout made prior to June 30, 2002 for a lottery drawing held prior to July 1, 2002 will be exempt from taxation.<sup>105</sup> As stated above, the penalty for underestimating the adjusted gross income tax is no longer combined with the payments of the utility receipts tax.<sup>106</sup> If a federal modification is made to a taxpayer's federal or Indiana adjusted gross income, then the taxpayer is required to file an amended Indiana return within 120 days after such modification is made. The General Assembly also eliminated the quarterly withholding report that is required of an entity making an electronic fund transfer to pay its withholding tax remittance.<sup>107</sup>

2. *Income Tax Credits*.—Along with making adjustments to the adjusted gross income tax, the General Assembly made a number of changes to the income tax credits. Also, a number of references to the gross income tax were deleted to the extent that such sections were deleted.<sup>108</sup> The General Assembly also clarified that taxpayers are not eligible for refunds of any unused income tax

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99. See *id.* § 6-2.5-6-15 (eff. July 1, 2003).

100. See *id.* § 6-3-3-5, § 6-3-3-5.1, and § 6-3-3-10 (eff. April 2, 2003).

101. See *id.* § 6-3-1-11 (retroactive to Jan. 1, 2003).

102. See *id.* § 6-3-1-3.5 (retroactive to Jan. 1, 2003).

103. *Id.* § 6-3-1-33 (retroactive to Jan. 1, 2003).

104. *Id.* § 6-3-2-8 (eff. Jan. 1, 2003).

105. *Id.* § 6-3-2-14.1 (retroactive to July 1, 2002).

106. See *id.* § 6-3-4-4.1 (eff. April 2, 2003).

107. See *id.* § 6-3-4-8.1 (eff. July 1, 2003).

108. *Id.* § 6-3.1-18-8 (eff. April 2, 2003).



credits.<sup>109</sup>

*a. Income tax credit extensions.*—The General assembly extended the following income tax credits. The research expense credit is extended until December 31, 2013.<sup>110</sup> Also, the voluntary remediation tax credit is extended until December 31, 2005.<sup>111</sup>

*b. Community revitalization enhancement district tax credit.*—Pass through entities were retroactively made eligible to receive the community revitalization enhancement tax credit.<sup>112</sup> However, a pass through entity as used in community revitalization enhancement tax credit section was defined as a corporation that is exempt from the adjusted gross income tax under Indiana Code section 6-3-2-2.8(2), a partnership, a limited liability company, or a limited liability partnership.<sup>113</sup>

*c. Voluntary remediation tax credit.*—As for the voluntary remediation tax credit, the General Assembly defined a legislative body as the city council if a voluntary remediation property is located in such city.<sup>114</sup> Similarly, a legislative body is defined as the “county council” if such remediation property is located in that county and not in a city.<sup>115</sup>

The General Assembly added a provision to the definition of “qualified investment” such that costs incurred in Indiana due to the remediation of a brownfield, which are not paid from state financial assistance, will result in taxable income to any other Indiana taxpayer.<sup>116</sup> Another provision was added allowing a taxpayer to carry back any unused voluntary remediation tax credit to the immediately preceding taxable year before the credit is initially claimed.<sup>117</sup> Further, the voluntary remediation tax credit was extended until December 31, 2005.<sup>118</sup>

*d. Venture capital investment tax credit.*—The General Assembly added a provision retroactively entitling pass through entities to become eligible for the venture capital investment tax credit.<sup>119</sup> Further, to be entitled to full 20% of the amount of the qualified investment capital provided to a qualified Indiana business,<sup>120</sup> a taxpayer must, in addition to providing such investment to a qualified Indiana business, provide the Department of Commerce with a proposed investment plan, which plan must be approved by the Department of

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109. See *id.* § 6-3.1-24-12 (retroactive to Jan. 1, 2003).

110. *Id.* § 6-3.1-4-6 (eff. July 1 2003).

111. *Id.* § 6-3.1-23-16 (eff. Jan. 1, 2004).

112. See *id.* § 6-3.1-19-3 (retroactive to Jan. 1, 2003).

113. *Id.*

114. See *id.* § 6-3.1-23-1.5 (eff. Jan. 1, 2004).

115. See *id.*

116. See *id.* § 6-3.1-23-3 (eff. Jan. 1, 2004).

117. See *id.* § 6-3.1-23-11 (eff. Jan. 1, 2002) (This is in addition to the previous provision allowing for a five year carry forward of any unused voluntary remediation tax credit.).

118. *Id.* § 6-3.1-23-16 (eff. Jan. 1, 2004).

119. See *id.* § 6-3.1-24-5 (retroactive to Jan. 1, 2003).

120. See *id.* § 6-3.1-24-10.

Commerce and be executed within two years of the approval in order to be eligible for the credit.<sup>121</sup> The filing must include: the name and address of the taxpayer; the name and address of each proposed recipient of the taxpayer's proposed investment; the amount of the proposed investment; a copy of the certification issued by the Department of Commerce that the proposed recipient is a qualified Indiana business; and, any other information required by the department of commerce.<sup>122</sup> Accompanying the investment plan filing requirement is a provision prohibiting the Department of Commerce from certifying such plan if the total amount of credits will be in excess of ten million dollars in any one calendar year.<sup>123</sup> The taxpayer receiving an approval from the Department of Commerce for their investment plan must submit a copy of the certificate to the Department when filing their tax return and claiming the credit.<sup>124</sup> In addition, the Indiana General Assembly clarified that, while a taxpayer is not entitled to a credit for providing qualified investment capital to a qualified Indiana business after December 31, 2008, taking such action may not be construed to prevent a taxpayer from carrying over to a taxable year beginning after December 31, 2008, an unused tax credit attributable to an investment occurring before January 1, 2009.<sup>125</sup> Finally, the requirement that a qualified business must be a high growth company entering a new product area, that requires jobs requiring a postsecondary education, and has a substantial number of employees who ear at least 150% of Indiana per capita income was eliminated from the definition of qualified business.<sup>126</sup>

*e. Coal combustion product tax credit.*—The General Assembly enacted a new section of the Indiana Code providing for the coal combustion product tax credit. "Coal combustion product" is defined as the byproducts resulting from the combustion of coal in a facility located in Indiana, including a fluidized bed boiler and includes boiler slag, bottom ash, fly ash, and scrubber sludge.<sup>127</sup> The coal combustion product tax credit applies to a taxpayer manufacturer that obtains and uses coal combustion products for the manufacturing of recycled components and is either a new business (an existing business that during a taxable year in which the taxpayer claims a credit, begins manufacturing recycled components) or an existing business that manufactures recycled components and during a taxable year in which the taxpayer claims a credit, increases acquisitions of coal combustion products by 10% of the year in which the most coal combustion products were obtained in any of the three previous taxable years immediately preceding the current taxable year.<sup>128</sup> "Recycled components" are defined as any goods of which coal combustion products constitute at least 15%

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121. See *id.* § 6-3.1-24-6 (retroactive to Jan. 1, 2003).

122. See *id.* § 6-3.1-24-12.5 (retroactive to Jan. 1, 2003).

123. See *id.* § 6-3.1-24-9 (retroactive to Jan. 1, 2003).

124. See *id.* § 6-3.1-24-13 (retroactive to Jan. 1, 2003).

125. See *id.* § 6-3.1-24-9 (retroactive to Jan. 1, 2003).

126. See *id.*

127. *Id.* § 6-3.1-25.2-1 (eff. Jan. 1, 2004).

128. See *id.* § 6-3.1-25.2-2 (eff. Jan. 1, 2004).



by weight of the substances of which the unit is composed, including aggregates, fillers, cementitious materials, or any combination of aggregates, filler, or cementitious materials that are used in the manufacture of masonry construction products (including portland cement based mortar), normal and lightweight concrete, blocks, bricks, pavers, pipes, prestressed concrete products, filter media, and other products approved by the Center for Coal Technology Research established under Indiana Code section 4-4-30.<sup>129</sup>

The coal combustion product tax credit is equal to \$2 per ton of coal combustion products used by a taxpayer if the taxpayer is a new manufacturer.<sup>130</sup> If the taxpayer is an existing manufacturer, then the coal combustion product tax credit only applies to the additional amount of coal combustion products used by the taxpayer.<sup>131</sup> Further, the maximum amount of coal combustion product tax credit available for any taxpayer in a fiscal year is \$2 million or less.<sup>132</sup> A taxpayer entitled to claim the coal combustion product tax credit may do so for each of ten consecutive taxable years, beginning with the taxable year in which the manufacturer first claims the credit.<sup>133</sup> However, a manufacturer is not entitled to carry over the excess to following taxable years nor is it entitled to carryback or refund any amount of unused tax credit.<sup>134</sup> A pass through entity is entitled to claim the coal combustion product tax credit.<sup>135</sup> To obtain a credit under this chapter, the manufacturer must file with the Department information that the Department determines is necessary for the calculation of the credit provided under this chapter.<sup>136</sup> The Department is to keep a list that includes the name of each manufacturer that receives a credit under this and the amount of each credit for the manufacturer in the taxable year.<sup>137</sup> The Department is further required to provide the list annually to the Center for Coal Technology Research.<sup>138</sup> However, a taxpayer that obtains a deduction for purchases of investment property by manufacturers of recycled components may not obtain a credit for coal combustion products in the same taxable year.<sup>139</sup>

*f. Hoosier business investment tax credit.*—The General Assembly also enacted the hoosier business investment tax credit. Further, the General Assembly established the Economic Development for a growing Economy Board (EDGE).<sup>140</sup> The General Assembly provided that EDGE will be responsible for not only carrying out the duties of the economic development for a growing

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129. *Id.* § 6-3.1-25.2-3 (eff. Jan. 1, 2004).

130. *See id.* § 6-3.1-25.2-5 (eff. Jan. 1, 2004).

131. *See id.*

132. *See id.*

133. *Id.* § 6-3.1-25.2-7 (eff. Jan. 1, 2004).

134. *Id.* § 6-3.1-25.2-8 (eff. Jan. 1, 2004).

135. *See id.* § 6-3.1-25.2-6 (eff. Jan. 1, 2004).

136. *Id.* § 6-3.1-25.2-9 (eff. Jan. 1, 2004).

137. *Id.*

138. *Id.*

139. *See id.* § 6-3.1-25.2-10 (eff. Jan. 1, 2004).

140. *See id.* § 6-3.1-13-12 (eff. July 1, 2003).

economy tax credit but also the duties of the hoosier business investment tax credit.<sup>141</sup> The hoosier business investment tax credit is extended to qualified investments defined as the amount of a taxpayer's expenditures for any of the following: the purchase of new telecommunications, production, manufacturing, fabrication, assembly, extraction, mining, processing, refining, or finishing equipment; the purchase of new computers and related equipment; costs associated with the modernization of existing telecommunications, production, manufacturing, fabrication, assembly, extraction, mining, processing, refining, or finishing facilities; onsite infrastructure improvements; the construction of new telecommunications, production, manufacturing, fabrication, assembly, extraction, mining, processing, refining, or finishing facilities; costs associated with retooling existing machinery and equipment; and, costs associated with the construction of special purpose buildings and foundations for use in the computer, software, biological sciences, or telecommunications industry.<sup>142</sup> However, the credit does not apply to property that can be readily moved outside Indiana.<sup>143</sup> A taxpayer making a qualified investment is entitled to credit in an amount equal to the lesser of 30% of the amount of the qualified investment, or the taxpayer's state tax liability growth.<sup>144</sup> The taxpayer may also carry forward any unused credit for a period of nine years.<sup>145</sup> Pass through entities are entitled to the hoosier business investment tax credit.<sup>146</sup>

The EDGE board may enter into an agreement with a taxpayer for a credit when, after reviewing the taxpayer's application, the EDGE board determines that the applicant has conducted business in Indiana for at least one year, the applicant's project will raise the total earnings of applicant's Indiana employees, the applicant's project is economically sound and will benefit the people of Indiana by increasing opportunities for employment and strengthening the economy of Indiana, receiving the tax credit is a major factor in the applicant's decision to go forward with the project and not receiving the tax credit will result in the applicant not raising the total earnings of employees in Indiana, awarding the tax credit will result in an overall positive fiscal impact to the state, as certified by the budget agency using the best available data, the credit is not prohibited by section 19 of this chapter, and the average wage that will be paid by the taxpayer to its employees (excluding highly compensated employees) at the location after the credit is given will be at least equal to 150% of the hourly minimum wage in Indiana.<sup>147</sup> The EDGE Board is required to certify the amount of tax credit that is to be awarded, and that amount is to be limited to the amount of qualified investment that is directly related to expanding the workforce in

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141. *See id.*

142. *See id.* § 6-3.1-26-8 (eff. July 1, 2003).

143. *See id.*

144. *See id.* § 6-3.1-26-14 (eff. July 1, 2003).

145. *Id.* § 6-3.1-26-15 (eff. July 1, 2003).

146. *See id.* § 6-3.1-26-11 (eff. July 1, 2003).

147. *See id.* § 6-3.1-26-18 (eff. July 1, 2003).



Indiana.<sup>148</sup> The EDGE Board is also required to enter into an agreement with the taxpayer prior to the taxpayer receipt of the credit.<sup>149</sup> Further, the taxpayer is required to submit to the Department a copy of the certificate verifying the amount of tax credit for the taxable year.<sup>150</sup> If the taxpayer fails to comply with this filing requirement, then an assessment may be allowed by the EDGE Board after the taxpayer has had an opportunity to explain such non-compliance.<sup>151</sup> The hoosier business investment tax credit is not allowed for taxpayers who relocate jobs from one location in Indiana to another location in Indiana.<sup>152</sup> Further, the credit is set to expire after December 31, 2005, however, that expiration does not prevent a taxpayer from carrying forward any credit awarded prior to January 1, 2006.<sup>153</sup>

*g. Biodiesel production facility tax credit.*—The General Assembly created another tax credit for a taxpayer that produces biodiesel at a facility located in Indiana.<sup>154</sup> The credit is set equal to one dollar per gallon of biodiesel produced in Indiana and used to produce blended biodiesel and will be reduced by any subsidy or credit that the taxpayer is entitled to receive from the federal government.<sup>155</sup> Pass through entities<sup>156</sup> are eligible for the credit and the credit can be applied against the sales tax, the adjusted gross income tax, the financial institutions tax, and the insurance premiums tax.<sup>157</sup> The credit is limited to one million dollars for all taxpayers in all taxable years.<sup>158</sup>

Similarly, a credit is provided for the producer of blended biodiesel at a facility located in Indiana.<sup>159</sup> The credit is equal to two cents per gallon of blended biodiesel produced in Indiana and, like the biodiesel production tax credit is to be reduced by the amount of any federal subsidy or credit that the taxpayer receives from the federal government.<sup>160</sup> Pass through entities<sup>161</sup> are eligible for the credit, and the total credits for all taxpayers in all taxable years may not exceed one million dollars.<sup>162</sup> The tax credit may be applied against the sales tax, adjusted gross income tax liability, financial institutions tax liability, and insurance premiums tax liability.<sup>163</sup>

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148. See *id.* § 6-3.1-26-20 (eff. July 1, 2003).

149. See *id.* § 6-3.1-26-21 (eff. July 1, 2003).

150. See *id.* § 6-3.1-26-22 (eff. July 1, 2003).

151. See *id.* § 6-3.1-26-23 (eff. July 1, 2003).

152. See *id.* § 6-3.1-26-19 (eff. July 1, 2003).

153. See *id.* § 6-3.1-26-26 (eff. July 1, 2003).

154. See *id.* § 6-3.1-27 (eff. Jan. 1, 2004).

155. See *id.* § 6-3.1-27-8 (eff. Jan. 1, 2004).

156. See *id.* § 6-3.1-27-11 (eff. Jan. 1, 2004).

157. See *id.* § 6-3.1-27-6 (eff. Jan. 1, 2004).

158. See *id.* § 6-3.1-27-8 (eff. Jan. 1, 2004).

159. See *id.* § 6-3.1-27-9 (eff. Jan. 1, 2004).

160. See *id.*

161. See *id.* § 6-3.1-27-11 (eff. Jan. 1, 2004).

162. See *id.* § 6-3.1-27-9 (eff. Jan. 1, 2004).

163. See *id.* § 6-3.1-27-6 (eff. Jan. 1, 2004).

The General Assembly also provided a similar tax credit for a dealer operating a service station in Indiana and selling blended biodiesel through a metered pump.<sup>164</sup> The credit is equal to one cent per gallon of blended biodiesel sold through the metered pumps and must be computed separately for each service station operated by the taxpayer.<sup>165</sup> The total amount of credits for all taxpayers for all taxable years may not exceed one million dollars.<sup>166</sup> The credit may be applied against the taxpayer's sales tax, adjusted gross income tax, financial institutions tax, and the insurance premiums tax liability.<sup>167</sup>

The amount of all three of these credits may be carried forward to subsequent taxable years; however, the credits may not be carried back or refunded.<sup>168</sup> The Department is to prescribe the forms to be used in claiming the credit.<sup>169</sup>

*h. Ethanol production tax credit.*—Similar to the biodiesel production tax credit, the General Assembly added the ethanol production tax credit which provides a credit for a facility located in Indiana and which is used to produce ethanol.<sup>170</sup> The ethanol production credit is available to facilities with a capacity to produce forty million gallons of ethanol per year as well as pre-existing facilities that increase their capacity by at least forty million gallons per year.<sup>171</sup> The credit is equal to 12.5 cents per gallon of ethanol produced at the Indiana facility.<sup>172</sup>

Pass through entities<sup>173</sup> are eligible for the credit and the credit may be applied against the sales tax, adjusted gross income tax, financial institutions tax, and the insurance premiums tax.<sup>174</sup> Taxpayers are entitled to carry forward the amount by which the credit exceeds the taxpayer's liability; however, the taxpayer is not entitled to a carry back or refund for any unused credit.<sup>175</sup> To claim the credit, the taxpayer must claim the credit on the taxpayer's Indiana tax return, provide a copy of the board's certificate finding that the facility is a qualified facility under pursuant to Indiana Code section 4-23-5.5-17, and submit to the Department all proof that the Department deems as necessary.<sup>176</sup>

Similar to the biodiesel production tax credit, the total amount of credits allowed for a taxpayer in all taxable years may not exceed five million dollars and the total amount of credits for all taxpayers may not exceed ten million

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164. *See id.* § 6-3.1-27-10 (eff. Jan. 1, 2004).

165. *See id.*

166. *See id.*

167. *See id.* § 6-3.1-27-6 (eff. Jan. 1, 2004).

168. *See id.* § 6-3.1-27-12 (eff. Jan. 1, 2004).

169. *See id.* § 6-3.1-27-13 (eff. Jan. 1, 2004).

170. *See id.* § 6-3.1-28 (eff. Jan. 1, 2004).

171. *See id.* § 6-3.1-28-3 (eff. Jan. 1, 2004).

172. *See id.* § 6-3.1-28-7 (eff. Jan. 1, 2004).

173. *See id.* § 6-3.1-28-8 (eff. Jan. 1, 2004).

174. *See id.* § 6-3.1-28-5 (eff. Jan. 1, 2004).

175. *See id.* § 6-3.1-28-9 (eff. Jan. 1, 2004).

176. *See id.* § 6-3.1-28-10 (eff. Jan. 1, 2004).



dollars in all taxable years.<sup>177</sup>

3. *County Adjusted Gross Income Tax ("CAGIT")*.—The General Assembly added the following provisions to the CAGIT. Clay County may impose an additional CAGIT rate of one-fourth of one percent to finance, acquire, improve, renovate, or equip a county jail; and bond issued may be issued for 30 years.<sup>178</sup> The method for calculating the certified distribution for CAGIT revenues was changed too, so that the amount will be the amount received from that county for a taxable year ending before the calendar year in which the determination is made and reported on an annual return processed by the Department in the state fiscal year ending before July 1 of the calendar year in which the determination is made.<sup>179</sup> By August 2 of each year, the Department is to certify the amount determined above plus interest in the county's account that has accrued and has not been included in a certification made in a previous year.<sup>180</sup> The Department is to provide an informational summary of the calculations used to determine the certified distribution.<sup>181</sup> Also, the Department is required to certify an amount less than the amount determined to have been collected if the Department determines that a reduced distribution is necessary to offset overpayments made in a previous calendar year.<sup>182</sup> The Department may reduce the amount of the certified distribution over several years.<sup>183</sup> A county that initially imposes CAGIT in a year in which the Department makes a certification may adjust the distribution of a county to provide for a distribution in the immediately following calendar year.<sup>184</sup> The Department is required to adjust the certified distribution to provide the county with the distribution within ten months after the month in which additional revenue from the tax is initially collected.<sup>185</sup> The Department is also required to notify each county auditor of the balance in the county's adjusted gross income tax account as of the cutoff date specified by the budget agency.<sup>186</sup> Similarly, if the Department determines that a sufficient balance exists in a county's account, then the Department may make a supplemental distribution of such funds.<sup>187</sup>

4. *County Option Income Tax ("COIT")*.—The General Assembly provided a number of changes to the method for calculating the certified distribution of COIT revenues. Also, a provision was added that the amount is to be the amount received from that county for a taxable year ending before the calendar year in which the determination is made and the amount is to be reported on an annual

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177. See *id.* § 6-3.1-28-11 (eff. Jan. 1, 2004).

178. See *id.* § 6-3.5-1.1-3.3 (eff. Upon Passage).

179. See *id.* § 6-3.5-1.1-9 (eff. June 1, 2003).

180. See *id.*

181. See *id.*

182. See *id.*

183. See *id.*

184. See *id.*

185. See *id.*

186. See *id.* § 6-3.5-1.1-21 (eff. June 1, 2003).

187. See *id.* § 6-3.5-1.1-21.1 (eff. June 1, 2003).

return which is processed by the Department in the fiscal year ending before July 1 of the calendar year in which the determination is made.<sup>188</sup> Further, by August 2 of each year, the Department is to certify such amount plus interest in the county's account that has accrued and has not been included in a certification made in a previous year.<sup>189</sup> The Department is to provide a summary of the calculations used to determine the certified distribution.<sup>190</sup> Further, the Department is to certify an amount, which is less than the amount determined to have been collected, if the Department determines that a reduced distribution is necessary to offset overpayments made in a previous calendar year.<sup>191</sup> Similarly, the Department may reduce the amount of the certified distribution over several years.<sup>192</sup> A county that initially imposes COIT in a year in which the Department makes a certification may adjust the distribution of a county to provide for a distribution in the immediately following calendar year.<sup>193</sup> The Department is required to notify each county auditor by October 2 of each year of the balance in the county's COIT account as of the cutoff date as determined by the budget agency.<sup>194</sup> The Department may make a supplemental distribution to the county if the Department determines that a sufficient balance exists in a county's account as of October 2; the funds of such distribution will be deposited in the civil unit's rainy day fund.<sup>195</sup>

5. *County Economic Development Income Tax ("CEDIT")*.—Similar to the changes made to the CAGIT and COIT the General Assembly provided a number of changes to the CEDIT. The General Assembly provided that the maximum combined CAGIT and CEDIT rate in Clay County may not exceed one and five-tenths percent if the county uses the funds for a new jail.<sup>196</sup> Similarly, it provided a provision permitting a county to increase its CEDIT rate by one-quarter of one percent if it operates a courthouse that is subject to a federal court order to comply with the Americans with Disabilities Act.<sup>197</sup> The Department is required to notify by October 2 of each year the balance in a county's special account as of the cutoff date set by the budget agency.<sup>198</sup> As seen above in the CAGIT and COIT, the General Assembly changed the method for calculating the certified distribution for CEDIT revenues. That is, the amount is be the amount received from that county for a taxable year ending before the calendar year in which the determination is made and the amount is to be reported on an annual return processed by the Department in the state fiscal year ending before July 1 of the

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188. *See id.*

189. *See id.*

190. *See id.*

191. *See id.*

192. *See id.*

193. *See id.*

194. *See id.* § 6-3.5-6-17.2 (eff. June 1, 2003).

195. *See id.* § 6-3.5-6-17.3 (eff. June 1, 2003).

196. *See id.* § 6-3.5-7-5 (eff. Upon Passage).

197. *See id.*

198. *See id.* § 6-3.5-7-10.5 (eff. June 1, 2003).



calendar year in which the determination is made.<sup>199</sup> Further, by August 2 of each year, the Department is to certify the amount, plus interest in the county's account that has accrued and has not been included in a certification made in a previous year.<sup>200</sup> Also, the Department is to provide a summary of the calculations used to determine the certified distribution.<sup>201</sup> Further, the Department is to certify an amount less than the amount determined to have been collected if the Department determines that a reduced distribution is necessary to offset overpayments made in a previous calendar year.<sup>202</sup> Similarly, the Department may reduce the amount of the certified distribution over several years.<sup>203</sup> A county that initially imposes CEDIT in a year in which the Department makes a certification may adjust the distribution of a county to provide for a distribution in the immediately following calendar year, and if so, the Department is to provide for a full transition to certification of distributions.<sup>204</sup> The Department may make a supplemental distribution to the county if the Department determines that a sufficient balance exists in a county's account as of October 2, which such funds are to be deposited in the civil unit's rainy day fund.<sup>205</sup>

For Randolph County, the additional CEDIT rate previously enacted may be used for financing constructing, acquiring, renovating, and equipping buildings and apparatus for a volunteer fire department that provides services in any part of the county and the previous provision providing that the use of those funds is for renovation and equipping the county courthouse was eliminated.<sup>206</sup> Similarly, the General Assembly provided the authority for a county council to impose an additional CEDIT rate to fund improvements to the county courthouse for court ordered improvements to comply with the Americans with Disabilities Act.<sup>207</sup> The funds raised by such action are to be deposited in the county facilities revenue fund and the tax revenues raised from the additional tax may not be used for any other purpose.<sup>208</sup> The effective date of such an adopted ordinance is to be determined as follows: if an ordinance is adopted before June 1 of a year, the tax rate takes effect on July 1 of that year; if the ordinance is adopted after May 31 of a year, then the tax rate takes effect on January 1 of the following year; and, if the county adopts the tax after May 31 effective January 1 of the following year, the then county is to receive its entire certified distribution for the year on November 1 of the year.<sup>209</sup>

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199. *See id.* § 6-3.5-7-11 (eff. June 1, 2003).

200. *See id.*

201. *See id.*

202. *See id.*

203. *See id.*

204. *See id.*

205. *See id.* § 6-3.5-7-17.3 (eff. June 1, 2003).

206. *See id.* § 6-3.5-7-22.5 (eff. Upon Passage).

207. *See id.* § 6-3.5-7-27 (eff. Upon Passage).

208. *See id.*

209. *See id.*

### *E. Inheritance Tax*

The General Assembly has now provided that a court order describing the fair market value of an estate is confidential.<sup>210</sup>

### *F. Financial Institution Tax*

The General Assembly deleted a reference to the already repealed gross income tax.<sup>211</sup> Also, an exception for property placed in service after September 11, 2001 was added retroactively to the definition of adjusted gross income for the imposition of the financial institution tax.<sup>212</sup> Further, the definition of "bonus depreciation" was added to mean an amount equal to that part of any depreciation allowance which was allowed in computing the taxpayer's federal taxable income that is attributable to the additional first-year special depreciation allowance (bonus depreciation) for qualified property allowed under Section 168(k) of the Internal Revenue Code.<sup>213</sup>

### *G. Special Fuel Tax*

A cross-reference was changed to account for the recodification of Title 10, State Policy, Emergency Management and Military Affairs.

### *H. Aircraft License Excise Tax*

The General Assembly provided that an aircraft owned by a corporate air carrier headquartered within Indiana is not exempt from aircraft registration and excise tax.<sup>214</sup> It also provided retroactively that an aircraft which is eligible for the property tax deduction pursuant to Indiana Code section 6-1.1-12.3 is not exempt from the aircraft excise tax.<sup>215</sup> An internal reference to a penalty provision for failure to register and pay the sales tax in a timely manner was corrected.<sup>216</sup>

### *I. Tobacco Products Tax*

The General Assembly eliminated the requirement for a cigarette distributor to post a bond or a letter of credit if the distributor has been in good standing with the Department for a minimum of five consecutive years.<sup>217</sup> Further, cigarette distributors are now required to include an invoice with the shipment

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210. *See id.* § 6-4.1-5-10 (eff. July 1, 2003).

211. *See id.* § 6-5.5-2-7 (eff. July 1, 2003).

212. *See id.* § 6-5.5-1-2 (retroactive to Jan. 1, 2003).

213. *See id.* § 6-5.5-1-20 (retroactive to Jan. 1, 2003).

214. *See id.* § 6-6-6.5-9 (eff. Jan. 1, 2004).

215. *See id.* § 6-6-6.5-12 (retroactive to Jan. 1, 2003).

216. *See id.* § 6-6-6.5-10 (eff. July 1, 2003).

217. *See id.* § 6-7-1-17 (eff. July 1, 2003).



or delivery of cigarettes to a retailer, and a duplicate of such invoice at the retailer's request, which invoice is required to be retained by such retailer for a minimum of two weeks.<sup>218</sup> Similarly, the Department now maintains the authority to suspend or revoke a tobacco product distributor's license for any failure to provide a retailer with an invoice and/or duplicate in accordance with the above.<sup>219</sup>

### *J. Tax Administration*

The General Assembly provided that if a county collects the innkeepers' tax, then the county treasurer has concurrent jurisdiction with the Department concerning audits, enforcement powers, and the authority to recover court costs and fees.<sup>220</sup> It also provided that if the Department determines that a proposed assessment includes an individual who is not responsible for the tax liability, a new assessment may be issued naming the taxpayer that is responsible for the liability, and, further, that the time limitation for issuing assessments does not apply to this section.<sup>221</sup> The General Assembly eliminated the requirement imposed upon the Department to request vehicle ownership and registration information on the income tax returns filed annually by taxpayers.<sup>222</sup> Similarly, the requirement that the Department notify the bureau of motor vehicles concerning auto excise tax evasion from information gathered off annual tax returns was eliminated.<sup>223</sup>

### *K. Innkeepers' Tax*

The General Assembly passed a number of provisions which affect the imposition of the Indiana Innkeepers' Tax in Indiana. The most important of these amend the various food and beverage tax statutes so as to provide a definition of "food sold for a to go or take out basis" which is consistent with the provisions which are now part of the sales and use tax statutes.<sup>224</sup> Also, the Knox County Innkeepers' Tax was repealed and an uncoded section was added so that Knox County can continue its tax under the authority of the uniform innkeepers' tax.<sup>225</sup> Further, Wayne County was granted the power to increase its innkeepers' tax by 1% to a maximum of 6%.<sup>226</sup>

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218. *See id.* § 6-7-1-18 (eff. July 1, 2003).

219. *See id.* § 6-7-1-11 (eff. July 1, 2003).

220. *See id.* § 6-8.1-3-12 (eff. July 1, 2003).

221. *See id.* § 6-8.1-5-2.5 (eff. July 1, 2003). This provision is also known as the "innocent spouse" provision.

222. *See id.* § 6-8.1-6-5 (eff. July 1, 2003).

223. *See id.* § 6-8.1-7-1 (eff. July 1, 2003).

224. *See id.* § 6-9-12-3; § 6-9-20-4; IC 6-9-21-4; § 6-9-23-4; § 6-9-14-4; § 6-9-25-4; § 6-9-26-7; § 6-9-27-4; § 6-9-33-4 (eff. Jan. 1, 2004)

225. *See id.* § 6-9-5 (eff. July 1, 2003).

226. *See id.* § 6-9-10-6 (eff. Upon Passage).

## II. INDIANA TAX COURT OPINIONS AND DECISIONS

During the period of October 1, 2002, to December 31, 2003, the Tax Court issued opinions and decisions pertaining to a variety of Indiana tax matters.<sup>227</sup> However, for the most part, these opinions and decisions dealt with real property taxes. Specifically, the Tax Court issued forty-two published opinions and decisions, twenty-six of which dealt with Indiana real property tax matters. The remaining sixteen cases are divided as follows: two cases involve the Indiana tangible personal property tax; seven cases involve the Indiana sales and use taxes; five cases involve the Indiana income tax; one case involves the Indiana withholding tax; and one case involves the controlled substance excise tax. Each opinion and decision is summarized separately below. Whenever the term "State Board" is hereinafter used, such term shall refer to the Indiana State Board of Tax Commissioners. Whenever the term "Indiana Board" is hereinafter used, such term shall refer to the Indiana Board of Tax Review. In such opinions, both the term "State Board" and the term "Indiana Board" are used, because the problem was first submitted to the State Board, but by the time a governmental determination was made with respect to the matter, the State Board had been replaced by the Indiana Board.

### A. *Indiana Property Taxes—Real Property Tax*

1. *Hamm v. Department of Local Government Finance*.<sup>228</sup>—Hamm is the owner of residential property in the Eagle Ridge subdivision located in Marion County, Indiana.<sup>229</sup> Hamm appealed his assessment for the 1995 tax year assessing his neighborhood desirability rating as "excellent." The Marion County Board of Review denied Hamm's claim; and, thereafter, Hamm filed Form 131 Petition for Review of Assessment with the State Board. The State Board denied Hamm's claim and Hamm initiated an original tax appeal on June 1, 1999.<sup>230</sup> Hamm's argument was that noise, a lack of adequate infrastructure, a difficult-to-access location, and destructive wildlife rendered a rating of "excellent" for his neighborhood improper.<sup>231</sup> The State Board countered Hamm's argument claiming that other features of the neighborhood are

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227. This *Survey Article on Recent Developments of Indiana Taxation*, published annually in the Indiana Law Review, has previously been updated on an annual basis covering all developments in Indiana Taxation for the period of October 1, of year before the last taxable year, to September 30, of the last taxable year. To simplify the note writing process, the Survey will now be based on a calendar year. This note covers all Indiana tax developments in the Indiana General Assembly and the opinions and decisions of the Indiana Tax Court from October 1, 2002, to December 31, 2003. Future articles will cover Indiana Tax developments for the calendar period from January 1, of the year before the last taxable year, to December 31, of the last taxable year when looking back from the year in which the article is published.

228. 788 N.E.2d 440 (Ind. Tax Ct. 2003).

229. *Id.* at 442.

230. *Id.*

231. *Id.* at 443.



excellent.<sup>232</sup> In support of his argument, Hamm submitted the following evidence: that his neighborhood is subject to noise pollution from small airplanes landing at nearby Eagle Creek Airport and automobile race cars driving at the nearby Speedway Racetrack; that access to this neighborhood is restricted by a narrow one-lane road; and, that public transportation and public utilities are not available to his neighborhood.<sup>233</sup> The Tax Court determined that all of Hamm's evidence established a *prima facie* case that a desirability rating of "excellent" for his neighborhood was improper.<sup>234</sup> The burden then shifted to the State Board to rebut Hamm's probative evidence and, more specifically, why their evidence shifts the balance toward a rating of "excellent."<sup>235</sup> The Tax Court determined that the State Board's evidence of secluded wooded lots located in a relative close proximity to major metropolitan areas was not a sufficient evidentiary basis to shift the balance from Hamm's presented evidence.<sup>236</sup> Thus, the Tax Court reversed the State Board's denial of Hamm's 131 Petition and remanded the case to the State Board with instruction to refer the matter the Marion County Property Tax Board of Appeals.<sup>237</sup>

2. *Lindemann v. Wood*.<sup>238</sup>—The Lindemanns were the owners of a house in Marion County, Indiana.<sup>239</sup> As a result of the 1995 general reassessment, the Lindemanns were assigned a grade of "B+2" on their home. The Lindemanns filed a Form 130 Petition for Review of Assessment with the Marion County Board of Review requesting that their grade be reduced.<sup>240</sup> That appeal was denied and the Lindemanns appealed to the State Board. While on appeal, the Marion County Board of Review issued a second final determination reducing the Lindemanns' grade factor to B-1.<sup>241</sup> However, three years later, the Marion County Board of Review sent the Lindemanns notice that the grade of their house was raised back to a "B+2."<sup>242</sup> The Lindemanns again appealed to the State Board which appeal was denied. On April 15, 2002, the Lindemanns initiated an original tax appeal.<sup>243</sup> The Lindemanns' argument was that, due to the Marion County Board of Review's second final determination lowering their grade factor, the Assessor is barred by doctrine of *res judicata* from raising the grade on their home prior to the next general reassessment or a change in circumstances.<sup>244</sup> The Tax Court determined that the four-factor test required to

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232. *Id.*

233. *Id.* at 443-44.

234. *Id.* at 444.

235. *Id.* at 445.

236. *Id.*

237. *Id.*

238. 799 N.E.2d 1230 (Ind. Tax Ct. 2003).

239. *Id.* at 1231.

240. *Id.*

241. *Id.* at 1232.

242. *Id.*

243. *Id.*

244. *Id.*

be met for estoppel of a subsequent action had been met in this instance. Specifically, the Tax Court determined that the Marion County Board of Review possessed the statutory jurisdiction to hear the Lindemanns' appeal; they acted in a judicial capacity by providing notice to the parties, taking evidence, and rendering their final determination; all parties had the opportunity to present evidence and testimony on the issues; and either side could have appealed the final determination to the State Board and ultimately the Tax Court.<sup>245</sup> Consequently, the Tax Court determined that pursuant to the principles of res judicata, the Marion County Assessor's assessment raising the grade of the Lindemanns' home from a "B-1" to a "B+2" was barred by the Lindemanns' successful appeal of their assessment to the Marion County Board of Review three years prior.<sup>246</sup>

3. *Grider v. Department of Local Government Finance*.<sup>247</sup>—The Griders were the owners of a home that they had build in Hamilton County, Indiana for the purpose of showcasing their antique collection.<sup>248</sup> In an effort to better accentuate their antique collection, the Griders had the exterior of the home built to look like a nineteenth century stable and had the interior kept very simple leaving out most common amenities. The Griders' home was assessed a grade of "A+2" for the 1998 assessment date. The Griders challenged this assessment to the Hamilton County Property Tax Assessment Board of Appeals and were granted a grade factor of "A." Still displeased with this assessment, the Griders filed Form 131 Petition for Review of Assessment with the State Board and were denied relief following an administrative hearing held on the matter. The Griders initiated an original tax appeal on July 6, 2001.<sup>249</sup> The Griders argument is that a grade factor of "A" is excessive and that the proper grade factor is a "C+2."<sup>250</sup> In support of their contention, the Griders submitted, as evidence, photographs depicting the interior and exterior of the home and a photocopy of a record card for a property alleged to be comparable to their own.<sup>251</sup> Further, the Griders testified as to features either lacking or differing from those listed on the grade specification charts in the Indiana Administrative Code tit. 50 r. 2.2-7-6.<sup>252</sup> The Tax Court determined that the Griders presented probative evidence supporting their position on their grade, and therefore, the burden had switched to the State Board to rebut the Griders' evidence with evidence of their own substantiating a grade of "A."<sup>253</sup> The Tax Court determined that the State Board's reliance on the testimony of local assessing officials was proper and given the record in its entirety, a reasonable person could find enough relevant evidence to support the

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245. *Id.* at 1233.

246. *Id.*

247. 799 N.E.2d 1239 (Ind. Tax Ct. 2003).

248. *Id.* at 1240.

249. *Id.*

250. *Id.* at 1241.

251. *Id.* at 1242.

252. *Id.*

253. *Id.*



State Board's determination.<sup>254</sup> Specifically, the Tax Court recognized that the Griders' home has features not present in the grade specification justifying the application of an "A" grade.<sup>255</sup> Consequently, the Tax Court affirmed the State Board's final determination.<sup>256</sup>

*B. Indiana Property Taxes—Business Real Property Tax*

1. *Miller Village Properties Co., LLP v. Indiana Board of Tax Review*.<sup>257</sup>—Miller Village is the owner of apartment buildings in Gary, Indiana. Miller Village appealed its 1995 assessment to the State Board and the State Board held a hearing on Miller Village's appeal on December 6, 2000. However, the General Assembly abolished the State Board on December 31, 2002, and passed legislation effective January 1, 2002 establishing the Indiana Board of Tax Review as the "successor" to the State Board.<sup>258</sup> Thus, in March 2002 the Indiana Board issued the final determination on Miller's case rather than the State Board.<sup>259</sup> On May 13, 2002, Miller Village filed its original tax appeal to the Indiana Board's final determination; however, Miller Village named the Indiana Board as the sole respondent to that action.<sup>260</sup> In its responsive pleadings, the Indiana Board alleged that Miller Village had failed to name the appropriate local government officials responsible for the original assessment as necessary parties to the proceeding and that as a result, the Tax Court lacked subject matter jurisdiction to over the case. On September 10, 2002, Miller Village filed a motion for leave to amend its complaint and include the necessary parties. Focusing on the Tax Court's statutory jurisdiction to hear original tax

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254. *Id.* at 1244.

255. *Id.* at 1233.

256. *Id.* at 1244.

257. 779 N.E.2d 986 (Ind. Tax Ct. 2002).

258. To address this change, the Tax Court has henceforth included the following, or similar, language in its opinions:

The State Board of Tax Commissioners ("State Board") was originally the Respondent in this appeal. However, the legislature abolished the State Board as of December 31, 2001. 198 Ind. Acts 2001 § 119(b)(2). Effective January 1, 2002, the legislature created the Department of Local Government Finance ("DLGF"), *see* Indiana Code § 6-1.1-30-1.1 (West Supp. 2001)(eff. 1-1-02); 198 Ind. Acts 2001 § 66, and the Indiana Board of Tax Review ("Indiana Board"). IND. CODE § 6-1.5-1-3 (West Supp. 2001)(eff. 1-1-02); 198 Ind. Acts 2001 § 95. Pursuant to Indiana Code § 6-1.5-5-8, the DLGF is substituted for the State Board in appeals from final determinations of the State Board that were issued before January 1, 2002. IND. CODE § 6-1.5-5-8 (West Supp. 2001)(eff. 1-1-02); 198 Ind. Acts 2001, § 95. Nevertheless, the law in effect prior to January 1, 2002 applies to these appeals. *Id.* *See also* 198 Ind. Acts 2001 § 117. Although the DLGF has been substituted as the Respondent, this Court will still reference the State Board throughout this opinion.

259. *Miller Village*, 779 NE2d at 987.

260. *Id.* at 987.

appeals,<sup>261</sup> the Tax Court determined that Indiana Code section 33-3-5-11(a) limited its ability to hear an appeal in which the taxpayer failed to comply with any of the statutory requirements for filing an original tax appeal.<sup>262</sup> Thus, by only naming the Indiana Board in its appeal, Miller Village failed to comply with the requirements for initiating an original tax appeal pursuant to Indiana Code section 6-1.1-15-5(b), requiring that the petitioner set forth the identification of parties to any proceeding of the agency action.<sup>263</sup> Further, the Tax Court determined that even if it granted Miller Village's motion to amend its petition, it could not relate back to the original forty-five days in which Miller Village had to initiate its original tax appeal to the Indiana Board's final determination.<sup>264</sup> Consequently, the Tax Court denied Miller Village's motion for leave to amend its petition and granted the Indiana Board's motion to dismiss for failure to name the necessary parties.<sup>265</sup>

2. *Park Steckley I v. Department of Local Government Finance*.<sup>266</sup>—Park Steckley is the owner of two commercial parcels located in Washington Township, Hamilton County, Indiana.<sup>267</sup> The parcels were contiguous and bordered by United States Highway 31 ("U.S. 31") to the east, a railroad line on the west, State Road 32 to the north, and 146th Street to the south; however, Park Steckley did not directly border U.S. 31.<sup>268</sup> Instead, there was a small sliver of land separating Park Steckley's commercial land from U.S. 31. Pursuant to a Hamilton County land order,<sup>269</sup> Park Steckley's land was assessed at \$180,000 per acre due to being located in the geographic area of "U.S. 31 Corr from 146th St to St. Rt 32" [sic].<sup>270</sup> After having been denied relief from both the Hamilton County Board of Review and the State Board, Park Steckley initiated its original tax appeal on July 2, 2001. The Tax Court focused on the definition of "U.S. 31 Corridor" in determining whether the State Board properly valued Park Steckley's parcels pursuant to Hamilton County's land order. Park Steckley argued essentially that the sliver of land separating their property from directly bordering U.S. 31 took them out of the land order's definition of U.S. 31 Corridor.<sup>271</sup> Analyzing the statutory construction of the term "U.S. 31 Corridor", the Tax Court determined that the plain and ordinary meaning of the term

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261. The Tax Court has "exclusive jurisdiction over any case that arises under the tax laws of [Indiana] and that is an initial tax appeal of a final determination." Indiana Code § 33-3-5-2(a).

262. *Miller Village*, 779 N.E.2d at 989.

263. *Id.*

264. *Id.* at 990.

265. *Id.*

266. 779 N.E.2d 1270 (Ind. Tax Ct. 2002).

267. *Id.* at 1271.

268. *Id.* at 1271-72.

269. This land order was promulgated by the Hamilton County land valuation commission pursuant to Indiana Code section 6-1.1-4-13-6 (1993) and was later adopted as a rule by State Board. *Id.* at 1272.

270. *Id.*

271. *Id.* at 1273.



“corridor” was “a . . . narrow passageway or route.”<sup>272</sup> Thus, Park Steckley’s land did not fit with in this meaning of “corridor.” Further, the State Board’s failed to present any evidence showing why Park Steckley’s land was comparable to the land under the definition of “U.S. 31 Corridor.”<sup>273</sup> Therefore, the Tax Court reversed the State Board’s final determination and remanded the case to the State Board.

3. *Clark v. Department of Local Government Finance*.<sup>274</sup>—Clark is the owner of two apartment buildings, the Woods Property and the Salisbury Property (the “apartment buildings”). On March 1, 1993, the State Board assessed Clark’s apartment buildings giving them a C grade and a 5% obsolescence factor.<sup>275</sup> In 1996, Clark appealed the State Board’s final determination and the Tax Court determined in favor of the taxpayer holding that “Clark presented a prima facie case showing that the C grade was excessive and improper and that the State Board had failed to quantify its award of a 5% obsolescence factor. Therefore, the Tax Court remanded the case to the State Board. On remand, the State Board issued its second final determination in which it increased the grade on Clark’s apartment buildings from a C to a C+ and denied any award of an obsolescence factor.”<sup>276</sup> Clark appealed that final determination. The Tax Court upheld the State Board’s determination as to the increase in grade finding that Clark failed to carry his burden of proof on remand.<sup>277</sup> Although Clark established a prima facie case at the first hearing of the Tax Court, the Tax Court determined that on remand it was Clark’s burden to present probative evidence that the grade given to the apartment buildings was improper or what the proper grade should have been.<sup>278</sup> Instead, Clark did nothing, and therefore, Clark did not meet his burden of proof. However, the Tax Court overruled the State Board’s reduction of its earlier award of a 5% obsolescence adjustment for the apartment buildings. Clark did present evidence on the remand hearing as to the obsolescence of the apartment buildings. However, the Tax Court determined that the evidence presented was based upon assumptions and estimations that were themselves without any concrete basis making the whole calculation arbitrary and yielding no evidentiary basis.<sup>279</sup> Although the Tax Court determined that Clark failed to carry the burden of quantifying the obsolescence on the apartment buildings, the Tax Court

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272. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 512 (1981)).

273. *Id.* at 1274.

274. 779 N.E.2d 1277 (Ind. Tax Ct. 2002).

275. *Id.* at 1280.

276. *Id.* at 1281.

277. *Id.* at 1282.

278. *Id.* at 1281-82.

279. *Id.* at 1284. Further, the Tax Court indicated that Clark failed to distinguish whether his claim was for economic obsolescence or functional obsolescence. The court ruled that “accordingly, in all cases where the Indiana Board of Tax Review holds a hearing on a taxpayer’s claim of obsolescence after the date of this case, taxpayers are required to specify whether they are seeking economic or functional obsolescence, or both.” *Id.* at 1283.



ultimately held that on remand the State Board could not take action to reduce the obsolescence award as the Tax Court had remanded the case only for the purpose of allowing Clark to make a *prima facie* case quantifying the amount of obsolescence to which Clark was entitled.<sup>280</sup>

4. *Eastgate Partnership v. Department of Local Government Finance*.<sup>281</sup>—Eastgate is the owner of the Marriott Inn located on two parcels of land in Warren Township, Marion County, Indiana between Interstate-70 and Interstate-465 on 21st Street. Eastgate appealed its 1989 reassessment to the State Board. In its final determination, the State Board valued Eastgate's land as a "Township-Other" assessing its primary land \$1.50 per square foot and its secondary land at \$1.05 per square foot.<sup>282</sup> Immediately thereafter, the Marion County Executive requested a rehearing pursuant to Indiana Code section 6-1.1-15-5(a), the result of which altered the Marion County Land Order for Warren Township increasing Eastgate's assessments \$1.50 to \$3.00 for its primary land and from \$1.05 to \$2.00 for its secondary land.<sup>283</sup> After appeal and remand by the Tax Court and after the State Board issued its final determination, Eastgate initiated its original tax appeal on August 17, 1998. Eastgate argued that its property was located on 21st Street and that the Marion County Executive's land order only applied to Shadeland Avenue.<sup>284</sup> Stated another way, Eastgate argued that, because the land order did not specifically refer to 21st Street, it should receive a designation of "township-other" and receive the benefit of the lower assessment. The Tax Court disagreed with Eastgate's reliance upon the earlier case of *The Precedent v. State Board of Tax Commissioners*<sup>285</sup> which required the State Board to assess a taxpayer's lands, which were outside of the land described in a land order, as being "Township-Other."<sup>286</sup> The Tax Court distinguished Eastgate's circumstances from those in *Precedent* due to the fact that Eastland fell squarely within the geographic area described in the land order as Shadeland Avenue south of I-70 to the Washington Street intersection.<sup>287</sup> Thus, the Tax Court affirmed the State Board's final determination increasing Eastgate's assessment pursuant to the Marion County Land Order for Warren Township.

5. *Beta Steel Corp. v. Department of Local Government Finance*.<sup>288</sup>—Beta is in the business of steel milling in Portage Township, Porter County, Indiana. On March 27, 1996, there was an explosion inside of Beta's steel mill that ripped a hole through the roof of Beta's mill and caused extensive damage to nearly thirty surrounding businesses.<sup>289</sup> As a result of the damage caused by the

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280. *Id.* at 1284.

281. 780 N.E.2d 435 (Ind. Tax Ct. 2002).

282. *Id.* at 437.

283. *Id.*

284. *Id.* at 438.

285. 659 N.E.2d 701 (Ind. Tax Ct. 1995).

286. *Eastgate*, 780 N.E.2d at 439.

287. *Id.*

288. 780 N.E.2d 439 (Ind. Tax Ct. 2002).

289. *Id.* at 441.



explosion, 15% of Beta's real property and 20% of Beta's personal property were destroyed. Beta filed Form 137R petition for survey and reassessment with the State Board, which was denied by the State Board because the State Board determined that relative to the total value of all assessed property in Portage Township, a substantial amount of Beta's property had not been destroyed.<sup>290</sup> Beta initiated an original tax appeal claiming that Indiana Code section 6-1.1-4-11 does not provide for a comparison between that property destroyed and the total assessed property value within that township for determining whether a "substantial amount" of property has been destroyed.<sup>291</sup> In deciding this case of first impression, the Tax Court agreed with Beta. Further, due to the fact that the State Board made its determination on Beta's Form 137R petition relative to the assessed property values of all property in Porter Township, that determination was arbitrary, capricious, and contrary to law.<sup>292</sup> In reviewing the statutory language of Indiana Code section 6-1.1-4-11, the Tax Court determined that the plain and ordinary meaning of "substantial amount" was synonymous with "substantial quantity" and not "substantial value" as the State Board asserted.<sup>293</sup> Thus, the Tax Court held in favor of Beta and remanded the case to the State Board for a survey and reassessment.

6. *Commonwealth Edison Co. of Indiana, Inc. v. Department of Local Government Finance*.<sup>294</sup>—Commonwealth is the owner of a public utility producing electricity in Lake County, Indiana. In accordance with Indiana Code section 6-1.1-8-19, Commonwealth filed its annual statement of value with the State Board in which it requested an equalization adjustment for the tax years 1995 through 1998.<sup>295</sup> The State Board denied the request and Commonwealth initiated an original tax appeal for each of the four taxable years at issue which were consolidated on October 19, 1998.<sup>296</sup> Commonwealth argued that although its property was assessed at 33% of its full market value, other taxpayers in Lake County had historically been assessed at a percentage as low as 10% to 11% of their full market value. Therefore, Commonwealth claimed that it was entitled to an equalization adjustment.<sup>297</sup> In support of its position, Commonwealth submitted as evidence at the administrative hearings a number of sales/assessment-ratio studies that Commonwealth had conducted with respect to Lake County and the problems involved in this case.<sup>298</sup> The Tax Court agreed with Commonwealth and held that after Commonwealth had carried its burden

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290. *Id.*

291. *Id.* at 442.

292. *Id.* at 443.

293. *Id.* at 442; see WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 72 (1981).

294. 780 N.E.2d 885 (Ind. Tax Ct. 2002).

295. *Id.* at 887.

296. *Id.*

297. *Id.* at 889.

298. *Id.* The study was prepared by a North Carolina consulting firm and consisted of a random sampling of 200 normal sales of property in Lake County during the years at issue and compared those sales figures to the full market value of the properties sold. *Id.*



of establishing a *prima facie* case for the equalization adjustment, which it did with the market study, that the burden then shifted to the State Board to rebut such evidence.<sup>299</sup> However, the State Board failed to do so. Instead the State Board simply argued that quality of the evidence was not relative because the standard for property valuation was the true tax value and not market value. The Tax Court agreed but corrected the State Board's confusion as to what the true tax value meant. Specifically, the Tax Court determined that the fair market value is the presumable standard for valuing public utility assessments until the State Board is able to rebut such a presumption.<sup>300</sup> Thus, the sales/assessment-ratio studies were determined to be an acceptable way to determine a uniform assessment.<sup>301</sup> The State Board next contended that, whether or not the market value is the proper way to determine the appropriateness of an equalization adjustment, Commonwealth's market study was unreliable.<sup>302</sup> However, the Tax Court disagreed and determined instead that Commonwealth's studies conformed to International Association of Assessing Officers guidelines as the prominent study to show market values, and to rebut such a strong presumption, the State Board must present substantial evidence showing what other options are available to taxpayers for such a determination.<sup>303</sup>

7. *Wittenberg Lutheran Village Endowment Corp. v. Lake County Property Tax Assessment Board of Appeals*.<sup>304</sup>—Wittenberg is a non-for-profit corporation affiliated with the Lutheran Church operating a retirement community in Crown Point, Indiana.<sup>305</sup> The retirement community provides a wide variety of integrated services to provide for the care of retirees including an assisted living facility, a chapel, and four separate living centers providing various levels of care at each center. To facilitate the care of its inhabitants, Wittenberg provides therapists, dentists, podiatrists, and at-call nursing services. On December 5, 2002, the Lake County Property Tax Assessment Board of Appeals revoked Wittenberg's charitable exemption for the 1999 tax year arguing that Wittenberg was a traditional apartment complex and which no longer provided care to the ill or infirm.<sup>306</sup> Wittenberg appealed this to the State Board, which denied Wittenberg's claim to the charitable exemption. Wittenberg initiated its original tax appeal on February 27, 2002. Wittenberg argued that the living center was designed to "provide a suitable environment for elderly person where they have peace, care and security in a Christian atmosphere."<sup>307</sup> Essentially, Wittenberg's argument was that senior individuals require varying levels of care to address their individual needs as they age, that the living center's various

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299. *Id.*

300. *Id.* at 890.

301. *Id.*

302. *Id.*

303. *Id.* at 891.

304. 782 N.E.2d 483 (Ind. Tax Ct. 2003).

305. *Id.* at 484.

306. *Id.* at 487.

307. *Id.* (quoting Pet'r Br. At 3).



accommodations were necessary to facilitate those needs, and that these factors constitute a charitable purpose. The Tax Court agreed and cited the earlier case of *Raintree Friends Housing, Inc. v. Indiana Department of State Revenue*<sup>308</sup> as precedent of its holding. More specifically, the Tax Court determined that the needs of senior citizens go beyond mere financial needs or health care needs and extend as far as need for a sense of community and involvement.<sup>309</sup> Further, the Tax Court determined that Wittenberg's living center met senior citizens needs for safety and security, sense of independence, and ability to function at an active level.<sup>310</sup> Consequently, the Tax Court held that Wittenberg's living center was owned, occupied, and used for a charitable purpose, and the final determination of the Indiana Board was not in accordance with the law.<sup>311</sup>

8. *Hamstra Builders, Inc. v. Department of Local Government Finance*.<sup>312</sup>—Hamstra is the owner of building in Franklin County, Indiana which was assessed at \$130,400 by the Brookville Township Assessor for the tax years 1991 through 1994.<sup>313</sup> On November 8, 1994, Hamstra filed four Form 133 Petitions for Correction of Error claiming that it was entitled to a kit building adjustment for its building lowering the assessment by 50%. The Franklin County Board of Review denied the petitions and Hamstra appealed the decision to the State Board. The State Board denied Hamstra's appeal and Hamstra initiated an original tax appeal on November 22, 1996.<sup>314</sup> Hamstra argued that its probative evidence established a prima facie case that it was entitled to the kit adjustment, and therefore, the State Board's denial of its appeal was arbitrary. Hamstra's submitted the written testimony of its certified appraiser outlining the specifics of why Hamstra's building qualified for the kit adjustment.<sup>315</sup> The Tax Court determined that the written testimony was probative evidence, and therefore, the burden shifted to the State Board to prove why the submitted deviations from the basic kit model increased the building's cost so as to make it unqualified for the kit adjustment. In rebuttal of Hamstra's evidence, the State Board submitted photographs depicting four air conditioning units placed on the building's roof and asserted that the load produced from the weight of the units was inconsistent with the load specification for a kit building.<sup>316</sup> The Tax Court determined that the State Board's photographic evidence was insufficient to determination whether the building qualified for the kit adjustment. Consequently, the Tax Court reversed the State Board's final determination and remanded the case to the Indiana Board with instruction to apply the 50% kit building adjustment to

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308. 667 N.E.2d 810 (Ind. Tax Ct. 1996).

309. *Wittenberg*, 782 N.E.2d at 489.

310. *Id.*

311. *Id.*

312. 783 N.E.2d 387 (Ind. Tax Ct. 2003).

313. *Id.* at 389.

314. *Id.* at 390.

315. *Id.* at 391.

316. *Id.* at 392.

Hamstra's building.<sup>317</sup>

9. *Sollers Point Co. v. Department of Local Government Finance*.<sup>318</sup>—Sollers Point ("Sollers") is the owner of an eighteen-story building in Vanderburgh County, Indiana.<sup>319</sup> The Vanderburgh County Board of Review assessed Sollers' building as a General Commercial Mercantile ("GCM") model and assigned a grade of "B+2" to the property. On January 2, 1996, Sollers appealed that determination arguing that its building had fewer partitions than were assumed in the GCM models and that a grade of "B+2" was excessive. The Vanderburgh Board of Review adjusted Sollers' building for the portioning on the first floor and denied all other claims. Sollers filed Form 131 Petition for Review appealing the Vanderburgh Board of Review's determination to the State Board.<sup>320</sup> The State Board denied Sollers' petition and Sollers initiated an original tax appeal on February 1, 2002. Sollers maintained that it was entitled to a reduction to the base rate of its building because it contained less partitioning than was assumed to exist in the GCM models used in its assessment.<sup>321</sup> The State Board countered Sollers' claim by asserting that the regulations provide that GCM models presume "typical" partitioning and Sollers' quality of partitioning is "typical." In deciding the issue of whether Sollers' partitioning was typical of the GCM base model, the Tax Court determined that the regulations address partitioning in terms of cost.<sup>322</sup> More specifically, the Tax Court determined that in arguing that their partitioning is not "typical", a taxpayer could argue that its cost per square foot for partitioning in its improvement is different from the "typical" cost per square foot assumed in the base model as a means to effectively carry its burden.<sup>323</sup> The Tax Court determined that Sollers' evidence effectively established a cost difference of \$5.46 per square foot of floor space from the \$9.00 per square foot of floor space typical of partitioning assumed in the GCM base model regulations. Thus, the Tax Court held that Sollers met its burden of evidence and was entitled to a reduction in its base rate to account for the difference in the cost of partitioning. Next, the Tax Court decided the issue of whether Sollers was entitled to a reduction in its assessed grade from a "B+2" to a "C+1."<sup>324</sup> Sollers argued that the State Board erroneously graded its property and that it was entitled to a grade of "C+1." Sollers Point presented evidence at the administrative hearing in the form of testimony of its independent tax assessor. This evidence consisted solely of the assessor's thoughts of what exterior and interior deficiencies were present, and therefore, why Sollers was entitled to the grade reduction.<sup>325</sup> However, the

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317. *Id.*

318. 790 N.E.2d 185 (Ind. Tax Ct. 2003).

319. *Id.* at 187.

320. *Id.*

321. *Id.* at 188.

322. *Id.*

323. *Id.* at 189.

324. *Id.* at 191.

325. *Id.*



Tax Court determined that the testimony presented was nothing more than conclusory statements, and without more probative evidence substantiating the assessor's beliefs, the burden of evidence had not been met.<sup>326</sup> Thus, the Tax Court denied Sollers' claim for a grade reduction and upheld the State Board's final determination assessing Sollers' building with a grade of "B+2."<sup>327</sup>

10. *U.S. Steel Corp. v. Lake County Property Tax Assessment Board of Appeals*.<sup>328</sup>—U.S. Steel is a steel manufacturer operating a plant in Lake County, Indiana.<sup>329</sup> On May 5, 1998, U.S. Steel filed 100 Form 133 Petitions for Correction of Error claiming that tax assessment for its property in the tax years 1994 through 1996 were illegal as a matter of law. More specifically, U.S. Steel argued that Lake County had illegally removed some \$210 million in total assessed value from the Lake County tax rolls, thus causing the county's tax rate to be overstated and forcing U.S. Steel to be overtaxed. The Lake County Property Tax Assessment Board of Appeals denied U.S. Steel's petitions and U.S. Steel appealed that denial to the State Board. In the Indiana Board's (the successor to the State Board) final determination denying U.S. Steel's claims, the Indiana Board determined that U.S. Steel was required to appeal the tax rate pursuant to Indiana Code section 6-1.1-17, and therefore, Form 133 was the wrong form to file for U.S. Steel's claim. On September 5, 2002, U.S. Steel initiated its original tax appeal.<sup>330</sup> In deciding the issue of whether the Indiana Board erred in dismissing U.S. Steel's claim for lack of subject matter, the Tax Court determined that the Indiana Board was in error. Specifically, the Tax Court determined that the Indiana Board had the authority and duty to determine whether U.S. Steel's appeal concerned a budget or a levy because the appeal broadly addressed a budget-driven tax rate.<sup>331</sup> Thus, the Tax Court held that even by the Indiana Board's own admission, U.S. Steel's claim involved the assessed value of land in Lake County.<sup>332</sup> Next, the Tax Court decided the issues of whether U.S. Steel's claim was properly brought by using Form 133 and whether U.S. Steel should have first appealed the Lake County tax rate pursuant to Indiana Code section 6-1.1-17.<sup>333</sup> The Tax Court determined that Indiana Code section 6-1.1-17 applied to ten or more citizens' rights to appeal a political subdivisions budget and not specifically the tax rate.<sup>334</sup> Thus, U.S. Steel was not required to first appeal the tax rate because U.S. Steel's claim had nothing to do with the Lake County budget and to do so would not have resulted in a final determination that U.S. Steel could have appealed to the State Board.<sup>335</sup> Turning

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326. *Id.*

327. *Id.* at 192.

328. 785 N.E.2d 1209 (Ind. Tax Ct. 2003).

329. *Id.* at 1211.

330. *Id.*

331. *Id.*

332. *Id.* at 1213.

333. *Id.*

334. *Id.* at 1214.

335. *Id.*

to the Form 133 issue, the Tax Court determined that U.S. Steel's claim was that the Lake County assessor had exercised unlawful subjective discretion in removing tax value from the Lake County tax rolls.<sup>336</sup> The Indiana Board argued that the removal of value from the Lake County tax rolls was itself an exercise of subjective discretion, and therefore, such removal could not be challenged on Form 133.<sup>337</sup> However, the Tax Court disagreed and determined that the Indiana Board may not exercise its subjective discretion illegally and then invoke the exercise of that unlawful subjective discretion as a bar to a taxpayer's claim because no official was vested with the discretion to act unlawfully.<sup>338</sup> Consequently, the Tax Court held that it was appropriate for U.S. Steel to state its claim using Form 133 as a matter of law.

11. *BP Amoco Corp. v. Lake County Property Tax Assessment Board of Appeals*.<sup>339</sup>—BP is one of the predominant oil and gas companies in the United States. As a part of its operations, BP owned real and personal property located in Lake County, Indiana. In 1999, BP filed 325 Form 133 Petitions for Correction of Error alleging that the Lake County property tax assessed upon its property for the 1995 through 1998 tax years was inequitable in comparison to other taxpayers in Lake County and therefore "illegal as a matter of law."<sup>340</sup> BP requested a refund in the amount of nearly \$20,000,000 for an equalization adjustment in order to account for this disparity among taxpayers in Lake County. The Lake County Property Tax Assessment Board of Appeals denied BP's petitions for relief and BP appealed the denial of its claim to the State Board. In August 2002, the Indiana Board (the successor to the State Board) issued its final determination upholding the denial of BP's relief. On September 24, 2002, BP filed an original tax appeal. The Indiana Board argued that BP's use of Form 133 was limited to the correction of objective determinations, but the request for an equalization adjustment involved the tax assessor's subjective judgment.<sup>341</sup> Thus, the Indiana Board claimed that Form 133 was the wrong form to use for this challenge. However, the Tax Court disagreed and determined that the Indiana Board's disposition of BP's claim was in error for failure to hold a hearing pursuant to Indiana Code section 6-1.1-15-12(e).<sup>342</sup> Thus, the Tax Court remanded the case to the Indiana Board as a matter of procedure.<sup>343</sup>

12. *Goodhost, LLC v. Department of Local Government Finance*.<sup>344</sup>—Goodhost is the owner of the American Inn located at 82nd Street and Interstate 69 in Marion County, Indiana.<sup>345</sup> The property is mainly low-income apartment

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336. *Id.* at 1215.

337. *Id.* at 1214.

338. *Id.*

339. 785 N.E.2d 1216 (Ind. Tax Ct. 2003).

340. *Id.* at 1218.

341. *Id.* at 1219.

342. *Id.* at 1219-20.

343. *Id.* at 1220.

344. 786 N.E.2d 813 (Ind. Tax Ct. 2003).

345. *Id.* at 814.



housing consisting of nineteen two-story apartment units situated on approximately ten acres of land. Goodhost appealed its assessment to the Marion County Board of Review alleging its land assessment as a hotel/motel at \$2.50 per square foot was in error. The Marion County Board of Review denied the claim and Goodhost appealed to the State Board. After a hearing, the State Board denied Goodhost's claim. On October 23, 1998, Goodhost initiated an original tax appeal.<sup>346</sup> Goodhost argued that its land should have been assessed as "apartment land" rather than "hotel/motel land" and that as a result, Goodhost was overtaxed with respect to the property.<sup>347</sup> Goodhost's land was assessed pursuant to a "land order" in which the values of commercial, residential, and industrial lands are compiled in accordance to their true tax value. Thus, the Tax Court determined that Goodhost bore the burden of presenting probative evidence showing that either the land was assessed differently than comparable properties or the land was assessed under the wrong section of such land order. In either of the following showings, it is necessary for the Tax Court to view the land order that is the subject of the taxpayer's appeal. The Tax Court determined that Goodhost, bearing the burden of proof, failed to provide the Tax Court with a copy of the land order pursuant to which the land was assessed.<sup>348</sup> Consequently, the Tax Court ruled that Goodhost was unable to reach the merits of Goodhost's claim, and therefore, the Tax Court affirmed the State Board's final determination.<sup>349</sup>

*13. Indian Industries, Inc. v. Department of Local Government Finance.*<sup>350</sup>—Indian is the owner of land and improvements in Evansville, Indiana.<sup>351</sup> Indian appealed its 1992 assessment by the Vanderburgh County Board of Review assessing the value of the property at \$794,230 by filing Form 131 Petition for Reassessment with the State Board. In Form 131, Indian claimed that it was entitled to an additional obsolescence adjustment due to the type of construction, plant layout, and functional utility of the plant. After a hearing on the issue, the State Board affirmed the previous denial of Indian's claim. Indian initiated its original tax appeal on January 3, 1997 and the Tax Court remanded the claim to the State Board for further proceedings. At a remand hearing, the State Board reduced the assessed value of Indian's assessment to \$686,430. Indian again initiated an original tax appeal challenging the State Board's final determination.<sup>352</sup> Indian alleges that it is entitled to a 70% obsolescence adjustment. A taxpayer seeking an obsolescence adjustment bears the burden of making a two-pronged showing.<sup>353</sup> First, the taxpayer is required to identify specific factors responsible for a loss of value to its improvement, and second,

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346. *Id.*

347. *Id.* at 815 (quoting Pet'r Br. at 2).

348. *Id.*

349. *Id.* at 816.

350. 791 N.E.2d 286 (Ind. Tax Ct. 2003).

351. *Id.* at 287.

352. *Id.* at 288.

353. *Id.*; see *Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230, 1238 (Ind. Tax Ct. 1998).

the taxpayer must quantify the amount of obsolescence to be applied to counter the loss of value.<sup>354</sup> In support of its claim, Indian submitted an "Assessment Review and Analysis" listing a number of factors lacking in its improvement and argued that the lack thereof entitled Indian to an obsolescence adjustment to account for an economic disadvantage in the market.<sup>355</sup> However, the Tax Court disagreed and determined that all Indian had done was provide the State Board with a list of possible causes for obsolescence with no sound calculations to determine the true impact of these disparities upon its property. Thus, the Tax Court determined that Indian failed to carry its burden of establishing and explaining its actual loss of value and was not entitled to a 70% obsolescence adjustment.<sup>356</sup> Indian also claimed that the State Board erred in assessing a grade to all parts of Indian's property, and as such, Indian was entitled to a grade reduction.<sup>357</sup> However, the Tax Court determined that Indian's evidence of the error in grade assessment were nothing more than conclusory statements, and without more probative evidence of how Indian calculated its reduced grade assessments and without evidence of how Indian's calculation differs from the State Board's calculation, Indian had not carried its burden of proof.<sup>358</sup> Thus, the Tax Court denied Indian's claim for a reduction in grade. Finally, Indian argued that its land had been valued improperly in comparison to other similarly situated properties in Vanderburgh County.<sup>359</sup> The Tax Court disagreed and determined that in a challenge of land valuation the taxpayer is required to submit a copy of the land order from which the subject property was assessed.<sup>360</sup> Having failed to provide the Tax Court with such copy, the Tax Court denied Indian's request for relief and affirmed the State Board's final determination.<sup>361</sup>

14. *Osolo Township v. Elkhart Maple Lane Associates L.P.*<sup>362</sup>—Maple Lane is the owner of a seventy-seven building apartment complex named Maple Lane in the Woods, located in Osolo Township, Elkhart County, Indiana. Maple Lane filed three Form 131 Petitions for Review of Assessment challenging its 2001 assessment. In each of the three petitions, Maple Lane claimed that the Elkhart Property Tax Assessment Board of Appeals had improperly classified the wooded areas located between apartment buildings and parking lots as "primary" lands.<sup>363</sup> After a hearing on the matter, the Indiana Board issued a final determination reclassifying Maple Lane's wooded areas as "usable undeveloped."<sup>364</sup> The Osolo Township Assessor appealed the Indiana Board's

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354. *Id.*

355. *Id.*

356. *Id.* at 290.

357. *Id.* at 291.

358. *Id.*

359. *Id.* at 292.

360. *Id.*

361. *Id.*

362. 789 N.E.2d 109 (Ind. Tax Ct. 2003).

363. *Id.* at 110.

364. *Id.* at 111.



final determination claiming that, pursuant to the regulations, Maple Lane's wooded areas are "necessary support land", and therefore, should be classified as "primary lands."<sup>365</sup> The Osolo Assessor's argument is essentially that, without the wooded lots, Maple Lane could not be "Maple Lane in the Woods" and would not have the same desirability to its inhabitants. In interpreting the regulatory meaning of the term "necessary support land," the Tax Court stated that the phrase is to be given its plain, ordinary, and usual meaning as presented in the dictionary.<sup>366</sup> Thus, the Tax Court determined that the term "necessary" was defined to mean "that [which] cannot be done without . . . absolutely required: essential, indispensable."<sup>367</sup> The term "support" was defined to mean "a means of livelihood, sustenance, or existence."<sup>368</sup> Thus, the Tax Court determined that "necessary support land" meant "land that was absolutely required and essential to support the operation of, and continued functioning as, an apartment complex."<sup>369</sup> Thus, the Tax Court reasoned that if the trees were removed from the property, Maple Lane could still operate effectively as an apartment complex, and therefore, the wooded lots were not "necessary support land."<sup>370</sup> Further, the Tax Court gave great deference to the Indiana Board's administrative interpretation because the Indiana Board's interpretation was not inconsistent with the regulation itself.<sup>371</sup> Consequently, the Tax Court affirmed the Indiana Board's final determination reclassifying Maple Lane's wooded lots as "usable undeveloped."<sup>372</sup>

15. *O'Neal Steel v. Vanderburgh County Tax Assessment Board of Appeals*.<sup>373</sup>—O'Neal Steel is the owner of a steel mill located in Center Township, Vanderburgh County, Indiana.<sup>374</sup> O'Neal Steel appealed its assessment for the 1996 through 1998 tax years. On their petitions, O'Neal Steel claimed that its building was assessed using the General Commercial Industrial pricing schedule and was entitled to a kit building adjustment reducing its tax amount by 50%. The Vanderburgh County Property Tax Assessment Board of Appeals denied O'Neal Steel's petitions, and O'Neal Steel appealed to the State Board. The State Board denied O'Neal Steel's relief, holding that the choice of pricing schedule requires an assessor's subjective intent. Therefore, Form 133 was an improper form to use for this complaint. O'Neal Steel initiated its original tax appeal on April 29, 2002.<sup>375</sup> O'Neal Steel argued that it was entitled to the kit adjustment because the decision to apply the adjustment did not require

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365. *Id.* at 112.

366. *Id.*

367. *Id.* (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 1511 (1981 ed.)).

368. *Id.* (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 2297 (1981 ed.)).

369. *Id.*

370. *Id.* at 113.

371. *Id.*

372. *Id.*

373. 791 N.E.2d 857 (Ind. Tax Ct. 2003).

374. *Id.* at 858.

375. *Id.* at 859.

a subjective determination. Therefore, Form 133 was the proper form to use for this type of a claim.<sup>376</sup> The Tax Court disagreed and determined that, although the determination of whether to apply the kit adjustment appears to be relatively uncomplicated, it ultimately turns on judgment calls such as the interpretations of the improvement's made to O'Neal Steel's building.<sup>377</sup> Alternatively, O'Neal Steel argued that the State Board Instructional Bulletin 92-1 approved and required the use of a 133 Petition to appeal the assessment of a kit building.<sup>378</sup> Although the Tax Court agreed that, on its face, Instructional Bulletin 92-1 approved the use of Form 133 Petitions for kit building appeals, Instructional Bulletin 92-1 further limited the effects of that Bulletin to appeals for the 1995 assessment year due to a unique procedural error.<sup>379</sup> Consequently, the Tax Court ruled that O'Neal Steel was not entitled to a kit adjustment through the filing of its Form 133 Petitions.

16. *Southworth v. Grant County Property Tax Assessment Board of Appeals*.<sup>380</sup>—Southworth is the owner of a commercial improvement located in Center Township, Grant County, Indiana. Southworth filed five Form 133 Petitions for Correction of Error with the Grant County Auditor for the 1997 through 2000 tax years. Southworth alleged that the improvement qualified for a kit building adjustment reducing the tax amount by 50%. The Grant County Tax Assessment Board of Appeals denied Southworth's claim and Southworth appealed that determination to the Indiana Board. The Indiana Board denied Southworth's petitions holding that the choice of pricing schedule requires an assessor's subjective intent. Therefore, Form 133 was an improper form to use for this complaint. Southworth initiated its original tax appeal on January 7, 2003.<sup>381</sup> The Tax Court agreed with the Indiana Board and determined that the decision to apply pricing schedules, including the kit building adjustment, turned on judgment calls of the assessor.<sup>382</sup> Thus, the Tax Court held that Form 133 was not the appropriate form for Southworth to present its claim for relief because the decision involved the subjective judgment of the assessor.<sup>383</sup>

17. *Community Hospital Foundation v. Department of Local Government Finance*.<sup>384</sup>—Community owns a hospital located in Lawrence Township, Marion County, Indiana. Community's property was situated in such a way that a ditch separated its parking lot from the street running adjacent to its property. Community appealed its tax assessment for the 1995 tax year claiming that the ditch on its property was improperly classified as "primary" land. The Marion County Board of Review denied Community's claim, and Community appealed

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376. *Id.*

377. *Id.* at 860.

378. *Id.*

379. *Id.* at 861-62.

380. 791 N.E.2d 862 (Ind. Tax Ct. 2003).

381. *Id.* at 863.

382. *Id.* at 864.

383. *Id.*

384. 794 N.E.2d 1168 (Ind. Tax Ct. 2003).



that denial to the State Board.<sup>385</sup> The State Board denied Community relief, and Community initiated its original tax appeal on November 12, 1998.<sup>386</sup> Community argued that the ditch in front of its land should be reclassified as “unusable undeveloped.”<sup>387</sup> In support of its claim, Community presented as evidence at the State Board hearing the testimony of its tax consultant. The testimony was that due to the slope of the ditch’s sides and the fact that the ditch was landlocked rendered it unusable for a commercial purpose.<sup>388</sup> Aerial photographs and a plat map substantiating the testimonial evidence given by Community’s tax consultant accompanied the testimony.<sup>389</sup> The Tax Court determined that Community’s testimony, accompanied with pictorial evidence, was sufficient to carry its burden of proof that a classification of “primary” for the ditch was improper.<sup>390</sup> The burden then shifted to the State Board to rebut Community’s evidence. The State Board argued that the ditch was “necessary support land” to Community, and therefore, the land was classified appropriately as “primary” land. However, the Tax Court determined that, without evidence showing that Community could not use its primary land without the ditch, the State Board’s contention was insufficient.<sup>391</sup> Consequently, the Tax Court remanded the case to the Indiana Board with instructions to reclassify Community’s ditch as “unusable undeveloped.”<sup>392</sup>

18. *Indiana C.A.P. Directors Association v. Department of Local Government Finance*.<sup>393</sup>—CAP is an Indiana non-profit organization that acquired property located in Indianapolis, Indiana. CAP purchased the new property on August 25, 1998 and on April 28, 1999, filed Form 136 Application for Property Tax Exemption for the 1998 tax year as a charitable organization using the land for a charitable purpose. The Marion County Property Tax Assessment Board of Appeals denied CAP’s claim stating that CAP did not use the newly acquired land for a charitable purpose. CAP appealed that decision to the State Board which determined that CAP’s Form 136 was not timely filed, and therefore, CAP’s claim was barred. CAP initiated its original tax appeal on April 7, 2000.<sup>394</sup> The Tax Court determined that Indiana Code section 6-1.1-11-3.5(a) was controlling, and under the plain, unambiguous, meaning of such section, CAP was required to file an application for tax exemption by May 15, 1998 for the 1999 tax year.<sup>395</sup> Nevertheless, CAP argued that the application must be filed

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385. *Id.* at 1169.

386. *Id.*

387. *Id.* at 1170.

388. *Id.* (quoting Stip. R. at 28).

389. *Id.* (quoting Stip. R. at 39 and 40).

390. *Id.*

391. *Id.*

392. *Id.* at 1171.

393. 797 N.E.2d 878 (Ind. Tax Ct. 2003).

394. *Id.* at 879.

395. *Id.* at 880.

in year the property taxes are due.<sup>396</sup> However, the Tax Court pointed out that the consequences of position. The Tax Court pointed out that interpreting the statute the way CAP did would mean that taxpayers would apply for a tax exemption after the taxes had been calculated and notices mailed due to the fact that Indiana's taxes are assessed a year in arrears.<sup>397</sup> Thus, the Tax Court read the applicable statute to require the filing of the exemption application in the year in which the property tax was assessed and not in the year the tax was due.<sup>398</sup> Alternatively, CAP argued that the Marion County Property Tax Assessment Board of Appeals waived the timely filing issue by not properly addressing the issue when the MCPTABA initially denied CAP's application.<sup>399</sup> The Tax Court disagreed and determined that, although the issue was not raised until the State Board's hearing, it was properly raised, and CAP's due process rights to review and rebut the State Board's disposition were met. Thus, the Tax Court denied CAP's relief and granted the State Board's motion for summary judgment.<sup>400</sup>

19. *Lacy Diversified Industries, Ltd. v. Department of Local Government Finance*.<sup>401</sup>—Lacy is the owner of a building located on Monument Circle, Marion County, Indianapolis, Indiana. The building was constructed in 1924 and the building consisted of office space and parking garage on floors one through six and office space only on floors seven through nine. For the 1995 and 1996 tax years, the Center Township Assessor valued Lacy's property, assigning it a "B" grade, or "good" condition, and subject to a 15% obsolescence adjustment. Lacy appealed the Center Township Assessor's determinations to the Marion County Board of Review. The Marion County Board of Review denied all claims for relief and Lacy then filed two Form 131 Petitions for Review of Assessment with the State Board. After conducting a hearing on the matter, the State Board issued two final determinations in which it lowered Lacy's condition rating from "good" to "average" but denied all other relief. Still unsatisfied, Lacy initiated an original tax appeal on March 21, 2001.<sup>402</sup> Lacy first argued that a grade of "B" is excessive and should be reduced to a proper grade of "C+1."<sup>403</sup> In support of its contention, Lacy submitted record cards and photocopies of photographs on six properties that Lacy claimed were similarly situated and comparable thereby to Lacy's building.<sup>404</sup> Similarly, for comparison, Lacy submitted the record card and photograph of Lacy's building. In addition to the record cards and photographs, Lacy submitted the testimony of their building manager who testified at the administrative hearing as to his opinion of why Lacy's building and the other buildings are comparable. The Tax Court

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396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.* at 881.

400. *Id.*

401. 799 N.E.2d 1215 (Ind. Tax Ct. 2003).

402. *Id.* at 1218.

403. *Id.* at 1219.

404. *Id.* at 1220.



determined that the photographic evidence and testimony submitted together amounted to little more than conclusory statements and did not rise to the level of probative evidence.<sup>405</sup> Further, that Tax Court stated it required “specific reasons . . . as to why a taxpayer believes a building is comparable, or why a building’s style is ‘moderately attractive’ as opposed to ‘architecturally attractive.’”<sup>406</sup> The Tax Court determined that Lacy failed to do so in this instance, and therefore, the State Board’s requirement to support its final determination with substantial evidence was not necessary.<sup>407</sup> Next, Lacy contended that the State Board erred in only lowering its condition rating to “average.” In support of its contention, Lacy submitted photographs illustrating some of the physical deterioration present in the building.<sup>408</sup> Further, Lacy submitted a summary of actual costs incurred in the restoration and repair of physical deterioration determined in the building in the past.<sup>409</sup> Despite this convincing evidence, the Tax Court determined that the evidence presented failed to provide a solid link between the physical deterioration and the age of the building.<sup>410</sup> Thus, the Tax Court reasoned the physical deterioration outlined at the administrative hearing could be the same, or significantly worse, than would normally be expected of a seventy year-old structure.<sup>411</sup> Consequently, without providing the Tax Court this needed link, the Tax Court affirmed the State Board’s final determination.<sup>412</sup> Finally, Lacy argued that Lacy is entitled to a 39% obsolescence adjustment and that the State Board erred in determining that the building was only entitled to a 15% obsolescence adjustment.<sup>413</sup> In support of its contention, Lacy submitted an income capitalization study of the building and a cost approach study to determine the fair market value of the building.<sup>414</sup> The income capitalization approach placed the fair market value of the building at \$3,218,036 using a 5% vacancy loss and an 11% return on net operating income. The cost approach calculated the replacement cost of the building after physical depreciation at \$5,268,592. Next, Lacy correlated the cost approach figures with those derived from the income capitalization study in order to show that the difference of \$2,050,556, or 39%, was directly attributable to obsolescence.<sup>415</sup> The Tax Court agreed, and despite the State Board’s contention that these approaches were not an appropriate means for quantifying obsolescence, the Tax Court determined that the State Board did not rebut Lacy’s *prima facie* showing nor deal with the probative evidence in a meaningful

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405. *Id.* at 1221.

406. *Id.*

407. *Id.* at 1222.

408. *Id.*

409. *Id.*

410. *Id.* at 1223.

411. *Id.*

412. *Id.*

413. *Id.* at 1225.

414. *Id.* at 1224.

415. *Id.* at 1225.

manner.<sup>416</sup> Consequently, the Tax Court remanded the issue of obsolescence to the State Board in order to instruct the Center Township Assessor to award Lacy a 39% obsolescence adjustment for the building.

20. *Regency Canterbury, LP v. Department of Local Government Finance*.<sup>417</sup>—Canterbury is the owner of an apartment complex located in Fort Wayne, Indiana. For the 2000 tax year, the apartment buildings located in Canterbury's apartment complex were assigned a grade of "C+1." Canterbury appealed the assessment to the Allen County Property Tax Assessment Board of Appeals which denied the appeal. Thereafter, Canterbury appealed that decision to the State Board.<sup>418</sup> After holding a hearing, the State Board issued a final determination which adjusted Canterbury's assessment to reflect deviations from the General Commercial Retail model; however, the State Board denied Canterbury's request for reduction in grade.<sup>419</sup> On November 21, 2001, Canterbury initiated an original tax appeal.<sup>420</sup> Canterbury alleges that while the State Board's reduction in the base rate to the apartment buildings was proper, the State Board erred when it failed to similarly reduce the grade.<sup>421</sup> The State Board countered Canterbury's contention by citing the Tax Court's decision in *Clark v. State Board of Tax Commissioners*, in which it argued that the Tax Court "mandated [the] use of the unit-in-place tables for a base cost adjustment instead of a grade adjustment."<sup>422</sup> Thus, the State Board contended that, when a base rate adjustment had been made, the State Board was precluded from making an adjustment to the grade.<sup>423</sup> However, the Tax Court determined that the State Board misinterpreted *Clark* and that such preclusion was unfounded.<sup>424</sup> That is, the Tax Court determined that *Clark* stood for the position that when an improvement deviates from the base model, the deviations used for adjusting the base rate cannot be the same basis for adjustments to the grade.<sup>425</sup> Thus, the Tax Court determined that Canterbury sought adjustments for the base rate and grade and cited separate and distinct deviations in support of each adjustment claimed.<sup>426</sup> Consequently, the Tax Court held that the State Board erred in not considering Canterbury's appeal of the grade; and therefore, the Tax Court remanded the case to the State Board for review of that claim.<sup>427</sup>

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416. *Id.*

417. 799 N.E.2d 1226 (Ind. Tax Ct. 2003).

418. *Id.* at 1227.

419. *Id.* at 1228.

420. *Id.*

421. *Id.*

422. *Id.* at 1229 (quoting *Clark*, 742 N.E.2d 46, 49 (Ind. Tax Ct. 2001)).

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*



21. *Trinity School of Natural Health, Inc. v. Kosciusko County Property Tax Assessment Board of Appeals*.<sup>428</sup>—Trinity is the owner and operator of correspondence school offering courses in “natural health for personal enrichment and self-improvement.”<sup>429</sup> Trinity owns, and the school is located, on two parcels of real property in Kosciusko County, Indiana.<sup>430</sup> On May 14, 1998, Trinity filed an application for the educational purposes exemption against the imposition of the Indiana business real property taxes with the Kosciusko Property Tax Assessment Board of Appeals. After holding an administrative hearing on the issue, Trinity’s appeal was denied. Trinity filed Form 132 Petition for Review of Exemption with the State Board to appeal the decision. The State Board appealed the Kosciusko Property Tax Assessment Board of Appeal’s final determination, and Trinity initiated an original tax appeal on March 22, 2002.<sup>431</sup> Trinity asserted that its primary purpose was to teach courses in science, health, and nature and that the predominant use of its property is related thereto; and, therefore, Trinity qualifies for the educational purposes exemption.<sup>432</sup> The Tax Court agreed with Trinity and determined that in deciding whether a certain property’s predominant use is educational, the Tax Court considers the public benefits that come from that property’s use.<sup>433</sup> In reviewing Trinity’s situation, the Tax Court compared it to a photography school which was successfully granted an educational purposes exemption in *State Board of Tax Commissioners v. Professional Photographers of America*.<sup>434</sup> In making the comparison, the Tax Court determined that as required in *Professional Photographers*, Trinity relieved the State of Indiana’s burden to some extent with programs and courses related to those offered in tax-supported schools.<sup>435</sup> Thus, the Tax Court reasoned that if Trinity were to stop providing lessons to students and grading tests, the program would no longer exist and tax-supported schools would be left to bear the burden of those students.<sup>436</sup> Consequently, the Tax Court ruled that Trinity was entitled to the educational purposes exemption as their educational use of the property was predominantly (and not merely incidentally) used for educational purposes.<sup>437</sup>

22. *Meridian Towers East and West v. Washington Township Assessor*.<sup>438</sup>—Meridian is the owner of two apartment buildings located in Marion County, Indianapolis, Indiana.<sup>439</sup> For the 1998 tax year, the Washington Township

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428. 799 N.E.2d 1234 (Ind. Tax Ct. 2003).

429. *Id.* at 1235-36 (quoting Pet’r Br. at 2-3).

430. *Id.* at 1236.

431. *Id.*

432. *Id.*

433. *Id.* at 1237.

434. 268 N.E.2d 617 (Ind. Tax Ct. 1971).

435. *Trinity*, 799 N.E.2d at 1238.

436. *Id.*

437. *Id.*

438. 805 N.E.2d 745 (Ind. Tax Ct. 2003).

439. *Id.* at 476.

Assessor applied a 10% obsolescence adjustment to Meridian's buildings. Meridian appealed the assessment to the Marion County Board of Review and Meridian's claims were denied. Meridian appealed that denial to the State Board alleging that their buildings were entitled to additional obsolescence adjustments. After a hearing on the matter, the State Board issued its final determination denying Meridian's claim for relief. Meridian initiated an original tax appeal on June 3, 2002.<sup>440</sup> Meridian argued that the State Board erred in upholding the Assessor's refusal to award additional obsolescence adjustments to its buildings because Meridian established a *prima facie* case showing that Meridian was entitled to such adjustments.<sup>441</sup> In support of its contention, Meridian presented a property tax assessment report that Meridian had ordered to be made with respect to their building from a Certified General Real Estate Appraiser.<sup>442</sup> That appraisal outlined how the location, lack of tenancy, and renovation needs had caused Meridian's buildings to suffer actual loss in value. The report went on to compare the fair market value of Meridian's buildings to other comparable buildings based on both the income capitalization approach and the cost approach to valuation.<sup>443</sup> The Tax Court determined that, through the presentation of its appraisal and further quantifying how that fair market value derived therefrom amounted to an obsolescence adjustment of 74%, Meridian had established a *prima facie* case that they were entitled to such adjustment.<sup>444</sup> Thus, the burden shifted to the Assessor to rebut Meridian's *prima facie* case by a showing of substantial evidence supporting its 10% obsolescence rating.<sup>445</sup> However, the Tax Court determined that the Assessor utterly failed to present any evidence rebutting Meridian's showing or, in the alternative, to offer calculations substantiating the lower obsolescence adjustment.<sup>446</sup> The evidence submitted in rebuttal consisted definitions of "net operating income" and a copy of the Indianapolis Business Journal's 1998 "Most Expensive Indianapolis-Area Apartment Communities" list.<sup>447</sup> The Assessor's argument was essentially that Meridian failed to participate in the apartment listing and that net operating income was income *expected* but not income that was promised.<sup>448</sup> However, despite the Assessor's failure to rebut Meridian's evidence quantifying the obsolescence adjustment of 74%, the Indiana Board upheld the Assessor award of lower obsolescence adjustment finding that the appraisal calculations were "severely flawed."<sup>449</sup> This, the Tax Court determined, was in error as it was the Assessor's burden, and not the Indiana Board's, to rebut Meridian's *prima facie*

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440. *Id.* at 477.

441. *Id.*

442. *Id.* at 478.

443. *Id.*

444. *Id.* at 479.

445. *Id.*

446. *Id.*

447. *Id.* at 480.

448. *Id.*

449. *Id.* (quoting Cert. Admin. R. 46-54).



showing. Consequently, the Tax Court held that the Indiana Board had exceeded its statutory authority pursuant to Indiana Code section 6-1.5-4-1(a) and the case was reversed and remanded to the Indiana Board with instructions to award Meridian's buildings a 74% obsolescence adjustment.<sup>450</sup>

23. *Muenich v. North Township Assessor*.<sup>451</sup>—The Muenich's are the owners of two vacant parcels of land located in North Township, Lake County, Indiana. The land is primarily rented to local area businesses as parking lots for the business' employees. For the 1995 general reassessment year, the Muenich's land was assigned a base rate of \$200 per front foot on one lot and \$250 per front foot on the second lot in accordance with the Lake County Land Order used by local assessing officials.<sup>452</sup> However, the Lake County Land Order, promulgated pursuant to Indiana Code section 6-1.1-4-13.6, provided that the base rate would fall within the range of \$150 per front foot to \$200 per front foot.<sup>453</sup> The Muenichs filed two Form 131 Petitions for Review of Assessment with the State Board challenging the assigned base rates. After holding a hearing on the matter, the State Board issued two separate final determinations in which it upheld the assessment on the first lot but reduced the assessment on the second lot to \$200 per front foot. Unhappy with the outcome, the Muenichs filed an appeal with the Tax Court on July 31, 2002.<sup>454</sup> In the Tax Court, the Muenichs first asserted that the Lake County Land order was invalid on its face because the land order itself failed to list the classification factors for improvements specifically listed in Indiana Code section 6-1.1-31-6(a). The Tax Court disagreed and deferred to the Indiana Supreme Courts ruling in *State Board of Tax Commissioners v. Indianapolis Racquet Club, Inc.*<sup>455</sup> The Tax Court determined that, in *Indianapolis Racquet Club*, the Supreme Court did not require land orders issued pursuant to Indiana Code section 6-1.1-31-6 to contain specifically the factors listed in Indiana Code section 6-1.1-31-6(a).<sup>456</sup> Instead, the Tax Court determined that the Supreme Court ruled in favor of allowing the use of actual market sales data in lieu of those factors contained in Indiana Code section 6-1.1-31-6(a).<sup>457</sup> Consequently, the Tax Court affirmed the Indiana Board's final determination as being in accordance with law.<sup>458</sup> Next, the Muenichs argued that, because the assessed value of their lots exceeds the fair market value of the lots, the Lake County Land Order is invalid in its application.<sup>459</sup> However, the Tax Court again deferred to the Supreme Court's ruling decision in *State Board*

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450. *Id.*

451. 801 N.E.2d 783 (Ind. Tax Ct. 2003).

452. *Id.* at 784.

453. *Id.*

454. *Id.*

455. 743 N.E.2d 247 (Ind. 2001).

456. *Muenich*, 801 N.E.2d at 786, (quoting *Indianapolis Racquet Club*, 743 N.E.2d at 251).

457. *Id.*

458. *Id.*

459. *Id.*

of *Tax Commissioners v. Town of St. John*.<sup>460</sup> Although the Tax Court determined that the 1995 assessment regulations provided for the "true tax value" of non-agricultural land to be its fair market value pursuant to *Town of St. John I*,<sup>461</sup> it nevertheless, had to defer to the Supreme Court's judgment in *Town of St. John II*,<sup>462</sup> which held that individual taxpayers are not substantively entitled to individual assessments or consideration of independent property wealth as evidence in their individual tax appeals.<sup>463</sup> Thus, the Tax Court determined that the Muenichs could not rely on their independent appraisals in order to show that the fair market value of their property was less than the assessed value.<sup>464</sup> In the alternative, the Tax Court determined that the Muenichs should have appealed the land order directly by a showing that "(1) comparable properties were assessed and taxed differently than their own under the land order or (2) their land was improperly assessed under the wrong section of the land order."<sup>465</sup> Because the administrative record was devoid of such evidence, the Tax Court held that the Muenichs did not make a prime facie showing that the assessed value of their land was unsupported by substantial evidence.<sup>466</sup>

### C. Indiana Property Taxes—Tangible Personal Property Tax

1. *Quaker Oats Co. v. Department of Local Government Finance*.<sup>467</sup>—Quaker Oats is a New Jersey Corporation with its principal place of business in Chicago, Illinois. For the 1999 tax year, Quaker Oats owned personal property (inventory) that was stored in a warehouse in Wayne Township, Marion County, Indiana. On April 27, 1999, Quaker Oats filed for an extension of time to file Form 103, which was due on May 15, 1999.<sup>468</sup> The Marion County Assessor granted Quaker Oats a thirty-day extension, however, the extension stated that the "EXTENSION GRANTED UNTIL JUN[E] 14, 1999 . . ."<sup>469</sup> Quaker Oats filed its Form 103 on June 15, 1999 claiming an interstate commerce exemption for the above mentioned inventory. The Marion County Assessor denied Quaker Oats' exemption claim stating that the form was not timely filed.<sup>470</sup> Quaker Oats appealed to the Marion County Property Tax Assessment Board of Appeals, and the Marion County Assessor's ruling was affirmed. Quaker Oats appealed this ruling to the State Board, arguing that the claim was timely filed, i.e., it was filed within the thirty-day extension. The State Board held a hearing on the matter and

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460. 702 N.E.2d 1034 (Ind. 1998) (*Town of St. John II*).

461. *Town of St. John v. State Bd. of Tax Comm'rs*, 665 N.E.2d 965, 967 (Ind. Tax Ct. 1996).

462. 702 N.E.2d 1034.

463. *Muenich*, 801 N.E.2d at 787.

464. *Id.*

465. *Id.*

466. *Id.*

467. 782 N.E.2d 1077 (Ind. Tax Ct. 2003).

468. *Id.* at 1079.

469. *Id.* at 1079-80 (quoting Admin. R. at 114).

470. *Id.* at 1080.



denied the claim affirming the original Marion County Property Tax Assessor Board of Appeal's determination. On May 4, 2001, Quaker Oats initiated an original tax appeal.<sup>471</sup> Quaker Oats argued that, regardless of the stamp stating that the extension expired on June 14, 1999, its Form 103 was timely filed within the expiration of that thirty-day extension.<sup>472</sup> The State Board countered Quaker Oats' contention by arguing that a thirty-day extension expired on June 14, as that was the date stamped on Quaker Oats' extension request.<sup>473</sup> In support of its argument, the State Board cited Indiana Administrative Code title 50 rule 4.2-2-3 which provides that "[a] thirty (30) day extension (to June 14) may be granted provided an extension is request in writing prior to May 15 of the current year."<sup>474</sup> The Tax Court agreed with Quaker Oats and determined that if the filing date of the form falls on a weekend or holiday, then the extension to June 14 would be less than thirty days and this would be in violation of Indiana Code section 6-1.1-3-7(b).<sup>475</sup> Consequently, the Tax Court ruled that the State Board's regulation that all thirty-day extensions be granted only until June 14 was invalid as a matter of law.<sup>476</sup> Thus, the Tax court reversed the State Board's determination and remanded the matter to the State Board with instructions to grant Quaker Oats the request Interstate Commerce Exemption.<sup>477</sup>

2. *Autoliv North America v. Department of Local Government Finance*.<sup>478</sup>—

Autoliv is an Indiana Company with its principal place of business in Marion County, Indiana. Autoliv is in the business of manufacturing locking wheels for seatbelt assemblies. Autoliv filed a Business Tangible Personal Property Return for the March 1, 1996 assessment date for three interrelated tools and applications software that are utilized in its manufacturing process.<sup>479</sup> Autoliv claimed that these tools and applications software were "special tools", and therefore, Autoliv was overassessed on the value of its business personal property. The State Board dispatched an auditor to audit Autoliv's property tax return and determined that the above-mentioned tools did not qualify for the "special tool" exemption. After a hearing, the State Board denied Autoliv's claim and affirmed the assessment finding that Autoliv had failed to present probative evidence entitling Autoliv to deduct the cost of the tools and software. On October 31, 1997, Autoliv initiated an original tax appeal.<sup>480</sup> Autoliv argued that it submitted evidence of the cost of the tools and software to the State Board which was arbitrarily ignored<sup>481</sup> and that Autoliv submitted a copy of a letter to

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471. *Id.*

472. *Id.* at 1080-81.

473. *Id.* at 1081.

474. *Id.* (quoting Ind. Admin. Code tit. 50, r. 4.2-2-3 (1996)).

475. *Id.* at 1082.

476. *Id.*

477. *Id.*

478. 784 N.E.2d 593 (Ind. Tax Ct. 2003).

479. *Id.* at 595.

480. *Id.*

481. *Id.* at 596.

the State Board from Autoliv's manufacturing manager stating the projected and estimated cost of the tools.<sup>482</sup> Similarly, Autoliv submitted a letter from a French employee stating the "approximate" software costs.<sup>483</sup> The Tax Court determined that State Board's rule requires a taxpayer to report the "total cost" of producing or acquiring special tools and attach such report to Form 103.<sup>484</sup> Thus, Autoliv's failure to provide any evidence of the actual acquisition cost of the special tools and application software was held to be a failure to provide sufficient evidence that Autoliv was entitled to deduct the costs from its assessments.<sup>485</sup> Consequently, the Tax Court affirmed the State Board's final determination denying Autoliv's claim.<sup>486</sup>

#### *D. Indiana Sales and Use Taxes*

1. *Stump v. Indiana Department of State Revenue*.<sup>487</sup>—As a result of a work-related accident both of Mr. Stump's legs were amputated below the knee. In 1999, Mr. Stump received a prescription from his physician, purchased a van, and then had it modified to accommodate his handicap. Mr. Stump paid the sales tax on the purchase of the van and later filed a claim for refund with the Department claiming that Indiana Code section 6-2.5-5-18 exempted the purchase of the van from sales tax. The Department denied that claim and Mr. Stump initiated an original tax appeal on December 27, 2000. On October 2, 2000, Mr. Stump purchased another van to modify to accommodate his prescription handicap. However, on this occasion, Mr. Stump failed to pay any sales tax on the purchase. The Department assessed Mr. Stump sales tax, penalties, and interest on the purchase of the van. Mr. Stump appealed the assessment upon the same basis as the earlier claim for refund on the first van purchase. Similarly, the Department denied such claim for exemption. Mr. Stump initiated another original tax appeal and subsequently a unified motion for summary judgment in both cases.<sup>488</sup> The Department argued, and the Tax Court agreed, that the Department's regulations only covered the medical equipment added to the vehicle pursuant to Stump's prescription for his handicap.<sup>489</sup> Giving the term "directly" its plain, ordinary, and usual meaning in resolving any ambiguity over the statutory construction, the Tax Court looked to the Webster's Third New

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482. *Id.*

483. *Id.* at 597.

484. *Id.* at 596; see Ind. Admin. Code tit. 50, r. 4.2-6-2(d)(1); *Standard Plastic Corp. v. Dep't of Local Gov't Fin.*, 773 N.E.2d 379 (Ind. Tax Ct. 2002).

485. *Autoliv*, 784 N.E.2d at 596-97.

486. *Id.*

487. 777 N.E.2d 799 (Ind. Tax Ct. 2002).

488. *Id.* at 800-01.

489. *Id.* at 801-02; see Ind. Admin. Code tit. 45, r. 2.2-5-28(h) "[t]he term 'medical equipment, supplies, and devices' [as used in Indiana Code § 6-2.5-5-18(a)] are those items, the use of which is directly required to correct or alleviate injury to [,] malfunction of, or removal of a portion of the purchaser's body."



Dictionary,<sup>490</sup> which defined the term “directly” as “without any intervening agency or instrumentality or determining influence: without any intermediate step.”<sup>491</sup> Therefore, because Stump’s van required the extra step of modification and addition of instruments to accommodate his handicap, it could not be said to directly alleviate Mr. Stump’s condition.<sup>492</sup> The Tax Court denied Mr. Stump’s contention that his insurance carrier had never paid sales tax on previous purchases of handicap-modified vans because businesses often obtain sales tax exemption certificates only to later pay a self-assessed use tax in lieu of the sales tax.<sup>493</sup> Similarly, the Tax Court denied Mr. Stump’s second contention that the Bureau of Motor Vehicles and Attorney General’s office assured him that the purchase of the second van would be tax exempt because neither of those authorities had the authority to make such an assurance.<sup>494</sup>

2. *1 Stop Auto Sales, Inc. v. Indiana Department of State Revenue*.<sup>495</sup>—1 Stop runs an automobile sales lot in Indiana, which sells vehicles on a “buy-here-pay-here” basis.<sup>496</sup> Customers choosing to do so may enter into an installment contract with 1 Stop and pay no money down. Customers exercising this financing option are not charged sales tax on the purchase price of the vehicle. Instead, 1 Stop loans the customer the money then remits the amount of the sales tax due on the purchase along with the sales tax due on the first monthly loan payment to the Department. In October 1996, 1 Stop allocated itself a reduction for its monthly taxable sales to account for prior bad debts.<sup>497</sup> Subsequently, the Department audited 1 Stop for the tax years 1994 through 1996 for its violation of taking a disallowed sales tax credit. 1 Stop was assessed an additional sale tax of \$131,625.95, plus interest of \$3407.84, which 1 Stop paid. 1 Stop filed a refund for each the audited tax years, claiming on each that 1 Stop was entitled to a sales tax refund for that portion of the receivables with respect to which a bad debt deduction was allowed for federal tax purposes. The Department denied all five claims, and 1 Stop initiated an original tax appeal on September 4, 1998.<sup>498</sup> The Tax Court dismissed 1 Stop’s refund claim for the tax year of 1993 for lack of subject matter jurisdiction due to the fact that the claim was not filed until after the three year statute of limitation had expired.<sup>499</sup> For the remaining four claims, the Department first contended that 1 Stop, as a retail merchant, was prohibited from absorbing or assuming a merchant’s sale tax pursuant to Indiana Code section 6-2.5-9-4, and therefore, 1 Stop is estopped

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490. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 641 (1981).

491. *Stump*, 777 N.E.2d at 802.

492. *Id.*

493. *Id.* at 803.

494. *Id.*

495. 779 N.E.2d 614 (Ind. Tax Ct. 2002).

496. *Id.* at 616.

497. *Id.* at 617.

498. *Id.*

499. See IND. CODE § 6-8.1-9-1(a).

from claiming the bad debt deduction.<sup>500</sup> However, the Tax Court disagreed and determined that the plain and ordinary meaning of “to assume or absorb” was to accept the legal liability for the payment of the tax or to exclude it altogether from the price of the automobiles.<sup>501</sup> 1 Stop did neither of these and at all times the customer bore the legal liability for the sales tax. The Department’s second contention was that 1 Stop should be estopped from claiming the bad debt deduction for failure to claim such bad debt on their Form ST-108 Certificates pursuant to Indiana Code section 6-2.5-6-9.<sup>502</sup> However, the Tax Court again disagreed and determined that this section of the Indiana Code, at most, required 1 Stop to certify that the sales tax on the vehicle purchase price had been paid. Further, the Tax Court determined that the Department is not entitled to adapt the statutory law by enacting rules or regulations.<sup>503</sup> Thus, 1 Stop complied with the requirements of the Indiana Code and was afforded the bad debt deduction pursuant to Indiana Code section 6-2.5-6-9(a).

3. *1 Stop Auto Sales, Inc. v. Indiana Department of Local Government Finance*.<sup>504</sup>—1 Stop requested a rehearing in the Tax Court after the Tax Court’s disposition of its request for a bad debt deduction.<sup>505</sup> 1 Stop claimed that if its Indiana bad debt deduction must be equivalent to its federal bad debt deduction, then 1 Stop would receive no relief from its Indiana bad debt deduction pursuant to Indiana Code section 6-2.5-6-9(a)(3). Specifically, 1 Stop argued that under federal accounting procedures, 1 Stop was required to offset its federal bad debt deduction by the value of vehicles 1 Stop repossessed in the tax years 1994 through 1996, and because these amounts are equal, 1 Stop will receive no benefit for Indiana tax purposes.<sup>506</sup> Because the General Assembly did not provide a definition for “written off” in its statutes, the Tax Court determined that the plain and ordinary meaning of “written off” in Indiana Code section 6-2.5-6-9(a)(3) means “[t]o remove [an asset] from the books, esp. as a loss or expense[.]”<sup>507</sup> Similarly the term “deduct” means to subtract from gross income when calculating taxable income.<sup>508</sup> Thus, the Tax Court held that for the purposes of Indiana’s bad debt statute, 1 Stop is entitled to a deduction in an amount equal to the amount of uncollectible Indiana receivables written off for federal tax purposes.<sup>509</sup>

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500. *1 Stop*, 779 N.E.2d at 619.

501. *Id.*

502. *Id.* at 620.

503. *Id.*

504. 785 N.E.2d 672 (Ind. Tax Ct. 2003).

505. *Id.* at 673.

506. *Id.*

507. *Id.* at 674 (quoting BLACK’S LAW DICTIONARY 1603 (7th ed. 1999)).

508. *Id.*; see *Subaru-Isuzu Auto., Inc. v. Ind. Dep’t of State Revenue*, 782 N.E.2d 1071 (Ind. Tax Ct. 2003).

509. *1 Stop Auto Sales, Inc.*, 785 N.E.2d at 674.



4. *Grand Victoria Casino & Resort, LP v. Indiana Department of Local Government Finance*.<sup>510</sup>—Grand Victoria is a Delaware limited partnership with its principle place of business in Chicago, Illinois.<sup>511</sup> Grand Victoria was created on January 21, 1999, as a result of a merger between two sister companies, Grand Victoria II, Inc. and Grand Victoria Casino & Resort, LLC of Indiana. Prior to the merger, Grand Victoria II's predecessor in interest contracted with Hilton Joint Venture, a New Orleans company, for the purchase of a riverboat. Thereafter, Grand Victoria assigned the contract to Grand Victoria II, who delivered the riverboat to Rising Sun, Indiana and leased it to Grand Victoria Casino and Resort.<sup>512</sup> As a result of the merger, Grand Victoria paid sales tax on the riverboat as a capital contribution from the merger. Similarly, Grand Victoria continued to pay sales tax with respect to purchases of: fuel; navigation equipment; maintenance, repair, and safety equipment; tickets; uniforms; supplies for the riverboat pilot house; lighting; bathroom supplies; and, heating and air conditioning equipment which Grand Victoria II had paid as the predecessor in interest to the riverboat. Grand Victoria filed four claims for refund with the Department, requesting a refund of sales tax in the total amount of \$3,688,949 for the 1996 through 1999 tax years. The Department denied all of Grand Victoria's claims for refund and on September 15, 2000, Grand Victoria initiated an original tax appeal.<sup>513</sup> First, Grand Victoria claimed that it was entitled to the public transportation exemption pursuant to Indiana Code section 6-2.5-5-27, and therefore, was exempt from sales tax with respect to its purchases of personal property and services for the riverboat.<sup>514</sup> However, the Tax Court determined that during the 1996 through 1999 tax years, Grand Victoria was required by Indiana gaming law to leave the docks before gaming could begin onboard.<sup>515</sup> Thus, the Tax Court reasoned, Grand Victoria could not be said to transport passengers for valid consideration due to the fact that a promise to do something already required by law has been held to be unenforceable.<sup>516</sup> Consequently, the Tax Court denied Grand Victoria's contention that Grand Victoria qualified for the public transportation exemption. Grand Victoria's second argument was that its purchases of satellite commercial broadcasts originating in Kentucky were exempt from sales tax as an interstate broadcast pursuant to Indiana Code section 6-2.5-4-6.<sup>517</sup> In viewing the clear language of the Indiana Code, the Tax Court concluded that the telecommunications services purchased by Grand Victoria were clearly interstate transmissions because both parties agreed that the transmissions originated in Kentucky. Thus, the Tax

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510. 789 N.E.2d 1041 (Ind. Tax Ct. 2003).

511. *Id.* at 1042.

512. *Id.* at 1042-43.

513. *Id.* at 1043.

514. *Id.* at 1044.

515. *Id.*; see IND. CODE § 4-33-9-2 (1998).

516. *Grand Victoria*, 789 N.E.2d at 1044; see *Lincoln Operating Co. v. Gillis*, 114 N.E.2d 873 (Ind. 1953).

517. *Grand Victoria*, 789 N.E.2d at 1044.

Court granted Grand Victoria's request for a refund on the sales tax paid to the Department for those transmissions.<sup>518</sup> Next, Grand Victoria asserts that the transfer of the riverboat from Grand Victoria II to Grand Victoria as a capital contribution of the merger was not subject to Indiana sales tax because the transfer occurred without consideration and therefore could not be considered selling at retail. The Department conceded this issue and the Tax Court granted Grand Victoria's motion for summary judgment thereon.<sup>519</sup> Alternatively, the Department countered Grand Victoria's contention that the riverboat was not subject to the Indiana sales tax by arguing that Grand Victoria's refund for the sales tax is offset by the amount of use tax that it really owes on the riverboat.<sup>520</sup> More specifically, the Department asserts that the riverboat lost its exemption from the Indiana use tax as leased property when Grand Victoria II merged into Grand Victoria. Grand Victoria argued that during the 1999 tax year the riverboat was classified as real property pursuant to Indiana Code, and therefore, Grand Victoria was not subject to Indiana use tax with respect to this riverboat.<sup>521</sup> The Tax Court agreed with Grand Victoria and determined that because a riverboat licensed under Indiana Code section 4-33 is classified as real property pursuant to Indiana Code section 6-1.1-1-15(5), it is inherently excluded from the definition of personal property under Indiana Code section 6-1.1-1-11(a)(6).<sup>522</sup> However, the Tax Court determined that because Grand Victoria's riverboat was not licensed under Indiana Code section 4-33 immediately after the transfer, Grand Victoria was subject to Indiana use tax for the period of April 1996 to September 1996 because the riverboat did not meet the statutory definition of real property.<sup>523</sup> Consequently, the Tax Court denied Grand Victoria's motion for summary judgment as to the refund of the sales tax on the transfer of the riverboat.<sup>524</sup>

5. *Trump Indiana, Inc. v. Indiana Department of Local Government Finance*.<sup>525</sup>—Trump is a Delaware corporation with its principal place of business in Gary, Indiana. In 1999, the Department audited Trump for the 1996 and 1997 tax years. As a result of the audit, Trump was assessed \$2,337,822.59 in sales tax for its purchase of a riverboat in 1996 and assessed nearly \$1.8 million in use tax of that riverboat in 1996 and 1997. Trump initiated its original tax appeal on January 8, 2002.<sup>526</sup> Trump argued that it is a licensed operator of the riverboat pursuant to Indiana Code section 4-33, and therefore, the riverboat qualifies for the public transportation exemption under Indiana Code section 6-

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518. *Id.* at 1045.

519. *Id.*

520. *Id.* at 1046.

521. *Id.*

522. *Id.* at 1046-47.

523. *Id.* at 1048.

524. *Id.*

525. 790 N.E.2d 192 (Ind. Tax Ct. 2003).

526. *Id.* at 194.



2.5-5-27.<sup>527</sup> The Tax Court determined that to qualify for the public transportation exemption the Department requires that there be the transport of people or property for consideration.<sup>528</sup> Further, the Tax Court determined that Trump was required by law to leave Indiana's dock before gaming could begin pursuant to Indiana Code section 4-33-2-9.<sup>529</sup> Thus, the Tax Court ruled that because the law required Trump to leave the dock to comply with Indiana Gaming laws, it could not be said that its movement was "bargained-for consideration."<sup>530</sup> Consequently, the Tax Court denied Trump's motion for summary judgment and ruled in favor of the Department. Next, Trump claimed that it was entitled to an equipment exemption for a hotdog bun warmer and microwave pursuant to Indiana Code section 6-2.5-5-3(b).<sup>531</sup> To qualify for the exemption, the Tax Court has required taxpayers to prove that the equipment was used to induce substantial chemical change in food, thereby transforming the food into a new marketable product.<sup>532</sup> However, the Tax Court determined that Trump was not entitled to the exemption due to the fact that by Trump's own admission the equipment was not used to alter the composition of the food but merely to keep it warm. Consequently, the Tax Court denied Trump's claim.<sup>533</sup> Trump's next claim was that the Department erred in assessing a use tax with respect to the acquisition of the riverboat because the riverboat was classified as real property pursuant to statute, and therefore, Trump was not subject to the Indiana use tax. However, the Tax Court determined that the Indiana use tax only applied to personal property and the General Assembly classified riverboats as real property when the boats were licensed, pursuant to Indiana Code section 6-1.1-1-15(5). Thus, the Tax Court determined that Trump's riverboat was real property, and therefore, was not subject to the Indiana use tax.<sup>534</sup> Finally, Trump contended that Trump should not be subject to the 10% negligence penalty which was proposed to be assessed with respect to Trump's sales and use tax deficiency because Trump acted reasonably in not withholding these taxes.<sup>535</sup> In support of its claim, Trump argued that its claims for the transportation exemption and equipment exemption were reasonable, and therefore, Trump's failure to withhold the use tax was not negligent. However, the Tax Court disagreed and determined that Trump's claim for the transportation exemption ignored fundamental tenants of contract law, and there was enough regulatory and case law on equipment exemptions to indicate that equipment used to keep food warm did not qualify for the equipment exemption. Consequently, the Tax Court upheld the imposition of the Department's 10% penalty due to Trump's failure

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527. *Id.* at 194-95.

528. *Id.* at 195.

529. *Id.*

530. *Id.*

531. *Id.* at 195-96.

532. *Id.* at 196.

533. *Id.*

534. *Id.* at 197.

535. *Id.*

to withhold the Indiana sales and use tax.<sup>536</sup>

6. *Howland v. Indiana Department of State Revenue*.<sup>537</sup>—Howland is the sole proprietor of Total Home Entertainment located in Whiteland, Indiana. Howland is in the business of selling and installing satellite dishes.<sup>538</sup> In 1994, the Department conducted an audit of Howland's government, and consequently, the Department issued a notice of proposed assessment for approximately \$150,000 against Howland, citing his failure to collect and remit the sales tax on his installation of satellites dishes. Howland protested that assessment, but the Department denied Howland's position. On November 20, 1997, Howland initiated an original tax appeal.<sup>539</sup> Howland argued that his installation services occurred only after he transferred title to the satellite to the customer.<sup>540</sup> In support of his contention, Howland testified that he considered the transaction to be complete when the satellite was delivered to the customer.<sup>541</sup> To the contrary, the Tax Court determined that the evidence established that Howland's customers paid only one price for the purchase and installation of equipment; thus, title did not transfer to the customer until after the installation was complete.<sup>542</sup> Stated another way, Howland did not itemize the cost of the equipment and the cost of the services to the customers. Consequently, the Tax Court affirmed the Department's ruling that Howland's services were subject to the Indiana sales tax.

7. *North Central Industries, Inc. v. Indiana Department of State Revenue*.<sup>543</sup>—North Central is an Indiana Corporation located in Muncie, Indiana which is in the business of purchasing fireworks in bulk from foreign vendors and repackaging the fireworks for sale to Indiana consumers.<sup>544</sup> North Central purchased a shrink-wrap machine in 1994 for the purpose of shrink-wrapping fireworks assortments. In 1997, the Department audited North Central and assessed North Central sales and use tax plus penalties for the shrink-wrapping machine in the amount of \$1988.15. North Central paid the tax and requested refund immediately thereafter, which the Department denied. On July 7, 1999, North Central initiated an original tax appeal.<sup>545</sup> North Central claims that their purchase and use of the shrink-wrapping equipment is tax exempt pursuant to Indiana Code section 6-2.5-5-3(b) because it is equipment acquired for direct use in the direct production of other tangible personal property.<sup>546</sup> Specifically, North Central argues that their rearrangement of fireworks into individualized

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536. *Id.* at 198.

537. 790 N.E.2d 627 (Ind. Tax Ct. 2003).

538. *Id.* at 628.

539. *Id.*

540. *Id.* at 630.

541. *Id.* (quoting Trial Tr. at 35).

542. *Id.*

543. 790 N.E.2d 198 (Ind. Tax Ct. 2003).

544. *Id.* at 199.

545. *Id.*

546. *Id.* at 200.



packaging is the creation of tangible personal property because it creates new combinations different in form and variety than the fireworks packaged in bulk.<sup>547</sup> The Tax Court determined that North Central's process does not create marketable products distinct from the fireworks as originally purchased in bulk.<sup>548</sup> Instead, the Tax Court determined, North Central was in the business of rearranging existing fireworks, then adding labels and shrink-wrap.<sup>549</sup> More importantly, the Tax Court emphasized the fact that regardless of the manner of packaging, North Central sold the same number of fireworks as were purchased in the first place, and therefore, North Central could not be said to be making a substantial change by placing the fireworks "in a form, composition, or character different from that in which [they were] acquired."<sup>550</sup> Thus, the Tax Court denied North Central's claim and granted the Department's motion for summary judgment.

*E. Indiana Income Taxes—Gross Income Tax*

1. *Enterprise Leasing Co. v. Indiana Department of State Revenue*.<sup>551</sup>—Enterprise is a non-Indiana based company operating automobile leasing companies out of Chicago, Illinois; Detroit, Michigan; Atlanta, Georgia; and St. Louis, Missouri. At no time did Enterprise maintain an office, warehouse, distribution center, employee, or any type of business location within Indiana.<sup>552</sup> The only contacts that Enterprise did have within Indiana were the leasing of automobiles to Indiana residents outside of Indiana and the long-term leasing of fleet automobiles to Indiana companies. However, pursuant to the fleet leases, the lessees at all times exercised the unitary control over the location of the leased vehicles and the car dealership from which to retrieve the fleet vehicles.<sup>553</sup> In March 1995, the Department assessed the petitioner for gross income tax, adjusted gross income tax, supplemental net income tax, and interest and penalties for Enterprise's fiscal tax years July 31, 1984 through July 31, 1993. Enterprise protested the Department's assessment and the Department denied the protest. Enterprise initiated its original tax appeal on July 1, 1998.<sup>554</sup> Enterprise's argument on summary judgment was that its gross income generated from the fleet lease agreements was not income derived from "sources within Indiana" as defined by Indiana Code section 6-2.1-2-2(a).<sup>555</sup> To decide whether the income was derived from sources within Indiana, the Tax Court divided the

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547. *Id.*

548. *Id.* at 201.

549. *Id.*

550. *Id.* at 201-02 (quoting Ind. Admin. Code tit. 45, r. 2.2-5-8(k)).

551. 779 N.E.2d 1284 (Ind. Tax Ct. 2002).

552. *Id.* at 1288.

553. *Id.* Further, the lessees are responsible for the repair, maintenance, insurance, licensing, and registration of the fleet vehicles. *Id.*

554. *Id.* at 1289.

555. *Id.*

issue into three sub-issues: the critical transaction test; the business situs test; and the tax situs test.<sup>556</sup> Pursuant to this framework, the Tax Court must first isolate Enterprise's transaction giving rise to the gross income (the critical transaction). Next, the Tax Court must determine the taxpayer's business situs, which amounts to any physical presence within Indiana or in the alternative any significant business activities that would satisfy the physical presence test. Finally, in reviewing the above two tests, the Tax Court must decide whether or not Enterprise's critical transaction is related to the business situs in such a way as to satisfy the tax situs.<sup>557</sup> The critical transaction in this instance was Enterprise's gross income derived from leasing vehicles to Indiana residents.<sup>558</sup> The Tax Court determined that, because Enterprise had never had its commercial domicile within Indiana, the disposition of the business situs test would be determined by reviewing Enterprise's significant business activities within Indiana.<sup>559</sup> The Department's argument on this issue was essentially that, because Enterprise leased vehicles to Indiana companies, the business situs test was satisfied pursuant to Indiana Administrative Code title 45, rule 1-1-49, providing that the "business situs" may be established through "[o]wnership, leasing, rental or other operation of income-producing property" in Indiana.<sup>560</sup> The Tax Court disagreed and determined that the term "operation," as used in 45 IAC 1-1-49(6) had, as a matter of precedent, been in reference to an active participation in the ownership, leasing, and rental of income-producing property.<sup>561</sup> Thus, Enterprise's minimal active participation of shipping the vehicles into Indiana dealers for the Indiana customer's pick-up did not rise to the level necessary to establish a business situs within Indiana.<sup>562</sup> Similarly, the Tax Court determined that, even if a business situs were to be established between Enterprise and Indiana, the tax situs test would not be met.<sup>563</sup> The test for establishing a tax situs is whether the activities conducted within Indiana are so related to the critical transaction and more than minimal, remote, or incidental to the transaction as a whole. Thus, the Tax Court determined that mere ownership of the leased vehicles located in Indiana, through no exclusive and active direction of those vehicles into Indiana, was not more than minimal and was remote and incidental to the lease transaction as a whole.<sup>564</sup> Next, the Department contended that Enterprise was required to include all leased vehicles, located, titled, and registered within Indiana in the calculation for determining

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556. *Id.*

557. *Id.* at 1290. If the transaction is too remote or incidental to the total transaction and very minimal, then the tax situs will not be found to be met. See *First Nat'l Leasing & Fin. Corp. v. Ind. Dep't of State Revenue*, 598 N.E.2d 640.

558. *Id.*

559. *Id.*

560. *Id.* at 1291 (quoting Ind. Admin. Code tit.45, r. 1-1-49(6)).

561. *Id.*

562. *Id.*

563. *Id.* at 1292.

564. *Id.*



their Indiana adjusted gross income tax and supplemental net income tax pursuant to Indiana Code section 6-3-2-2.<sup>565</sup> In reviewing the statutory construction of Indiana Code section 6-3-2-2(c), the Tax Court agreed with Enterprise's contention that to be taxed under this section, the taxpayer must first own or rent the property at issue, and second, the property at issue must be used by the taxpayer in Indiana during the year in question.<sup>566</sup> The Tax Court determined that had the legislature intended this section to be read as the Department argued, that two alternative requirements would have been worded as "that property is either owned or rented and used" not "owned and rented or used."<sup>567</sup> Therefore, the Tax Court granted Enterprises' motion for summary judgment.

2. *U-Haul Co. of Indiana, Inc. v. Indiana Department of State Revenue*.<sup>568</sup>—U-Haul is a part of the U-Haul Rental System conducting a moving equipment rental business in Indiana. The U-Haul Rental System is comprised of four groups of companies including fleet owners, rental companies, rental dealers, and U-Haul International.<sup>569</sup> The petitioners in this case were U-Haul Co. of Indiana and a rental dealer in the U-Haul Rental System. Rental dealers were the link between the U-Haul Rental System and the end customer. The rental dealers were responsible for displaying and renting the equipment and ultimately collecting the payments from the consumer. However, pursuant to contracts with the U-Haul rental companies, rental dealers were apportioned a standard percentage of that gross income collected from customers and were at all times required to remit the entire amount collected to U-Haul International. By 1996, the Department had audited U-Haul on two separate occasions and issued proposed assessments against U-Haul for the tax years 1988 and 1989, and 1993 through 1995 (the "years at issue") for gross income tax, interest, and a penalty with respect to 100% of the rental income collected by U-Haul for the years at issue.<sup>570</sup> In both instances, U-Haul protested the assessments, and in both instances, the Department denied those protests but waived the penalties. After having been denied a refund claim, U-Haul initiated an original tax appeal on January 6, 1998.<sup>571</sup> U-Haul contended that although U-Haul was acting as an agent on behalf of U-Haul International, U-Haul was not entitled to 100% of the gross income collected in that capacity, and therefore, U-Haul was only liable for the gross income tax to the extent that U-Haul was paid their standard contract

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565. *Id.* at 1293.

566. *Id.* Indiana Code section 6-3-2-2-(c) provides in pertinent part that "The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the taxable year and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the taxable year . . . ."

567. *Id.*

568. 784 N.E.2d 1078 (Ind. Tax Ct. 2002).

569. *Id.* at 1079-80.

570. *Id.* at 1080-81.

571. *Id.* at 1081.

apportionment therefrom. The Tax Court agreed and granted U-Haul's motion for summary judgment.<sup>572</sup> The Tax Court cited numerous sources in support of the granting of U-Haul's motion for summary judgment. First, the Tax Court determined "gross income" to be broadly defined by Indiana Code section 6-2.1-1-2(a) to mean "all gross receipts a taxpayer receives."<sup>573</sup> Similarly, the Tax Court determined that such section defined the term "receives" to mean "(1) the actual coming into possession of, or the crediting to, the taxpayer of gross income; or (2) the payment of a taxpayer's expenses, debts, or other obligations by a third party for the taxpayer's direct benefit." Thus, the Tax Court reasoned that U-Haul had an agency relationship with U-Haul International and direct remittance of all gross receipts to U-Haul International meant that U-Haul did not have a beneficial interest in 100% of the rental income collected in Indiana.<sup>574</sup> Further, the Tax Court looked to the Department's own regulations to support the concept that taxpayers acting in an agency capacity are treated merely as conduits for tax purposes, and therefore, U-Haul was not taxable on all gross receipts received by U-Haul.<sup>575</sup> Thus, the Tax Court determined that because U-Haul was a true agent of U-Haul International and because U-Haul had no legal right to the rental receipts, it was not proper to assess the gross income on 100% of those receipts.<sup>576</sup>

3. *Subaru-Isuzu Automotive, Inc. v. Indiana Department of State Revenue*.<sup>577</sup>—Subaru is an Indiana corporation in the business of manufacturing automobiles. In 1999 and 2000, the Department audited Subaru for the 1994 through 1998 tax years. As a result of those audits, the Department issued two separate proposed assessments against Subaru for the 1997 and 1998 tax years claiming that Subaru had failed to add back the property taxes that had been capitalized as inventory costs for Subaru's federal taxes and that Subaru had erred in calculating its net operating loss deductions. Subaru protested the Department's proposed assessments and the Department denied both. Subaru subsequently initiated an original tax appeal.<sup>578</sup> Subaru argued that because the federal tax laws appropriate inventory costs as exclusions from a taxpayer's gross income, Subaru's property taxes capitalized as inventory costs for federal tax purposes also qualify for an exclusion from gross income. Specifically, Subaru asserted that such capitalized costs are not deductions, but rather, they are exclusions for federal tax purposes, and therefore, are not subject to the federal deduction add-back provisions in Indiana Code section 6-3-1-3.5(b)(3).<sup>579</sup> The Tax Court held that the definition of the term "deduction" as used in Indiana Code section 6-3-1-3.5(b)(3) means the same as a deduction under federal law,

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572. *Id.* at 1084.

573. *Id.* at 1082 (quoting IND. CODE § 6-2.1-1-2(a) (1989)).

574. *Id.* at 1083.

575. *Id.*; see Ind. Admin. Code tit. 45, r. 1-1-54 (1992).

576. *U-Haul Co. of Ind.*, 784 N.E.2d at 1084.

577. 782 N.E.2d 1071 (Ind. Tax Ct. 2003).

578. *Id.* at 1073.

579. *Id.* at 1075.



no more, no less.<sup>580</sup> Thus, the Tax Court determined that Subaru's contention was correct and, because federal law did indeed treat their capitalized property taxes as inventory exclusion, such property taxes were not subject to the add-back provisions of Indiana Code section 6-3-1-3.5(b)(3).<sup>581</sup> Next, Subaru argued that pursuant to Indiana Code section 6-3-2-2.6(b), it was only required to adjust its net operating loss deduction by applying the adjusted gross income modifications in the years in which Subaru actually incurred a net operating loss.<sup>582</sup> To the contrary, the Department argued that Subaru was required to adjust its net operating loss deduction by applying the adjusted gross income modifications for every year in which it uses a net operating loss deduction.<sup>583</sup> The Tax Court agreed with Subaru. Specifically, the Tax Court determined that the Department's position was not substantiated by the clear and unambiguous meaning of Indiana Code sections 6-3-2-2.6(b) and 6-3-1-3.5(b), which require that corporations only apply the adjusted gross income modifications in calculating the net operating loss for the year in which the net operating loss was actually incurred.<sup>584</sup> Consequently, the Tax Court reversed the Department's final determination on both the add-back issue and the net operating loss issue and remanded both issues to the Department for further proceedings.<sup>585</sup>

#### *F. Indiana Income Taxes—Adjusted Gross Income Tax*

1. *Ziegler v. Indiana Department of State Revenue*.<sup>586</sup>—Joseph Zeigler and five other individuals (the "Petitioners") filed for a refund of their Indiana income tax paid for the 1997, 1998, and 1999 tax years.<sup>587</sup> Each of the Petitioners is a resident of Indiana and a retired federal government employee. The Petitioners claimed that, as a result of Indiana Code section 6-3-2-3.7, Federal Retirees who received any Federal Civil Service Annuity Income in excess of \$2000 per year were unfairly being assessed Indiana income taxes because retired State employees and other residents receiving Social Security benefits as retirement income were exempt from State income tax. In January 2001, the Petitioners filed a claim for refund with the Department.<sup>588</sup> By May 2001, the Department had acknowledged the receipt of the Petitioners' claims for refund but had never issued a final determination. On April 19, 2002, the Petitioners initiated an original tax appeal.<sup>589</sup> On October 22, 2002, the Petitioners filed a motion for partial summary judgment requesting that the Tax

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580. *Id.* at 1076.

581. *Id.*

582. *Id.*

583. *Id.*

584. *Id.* at 1077.

585. *Id.*

586. 797 N.E.2d 881 (Ind. Tax Ct. 2003).

587. *Id.* at 883.

588. *Id.* at 883.

589. *Id.*

Court hold that they were entitled, as a matter of law, to present their claim as a class action lawsuit on behalf of all similarly situated Indiana residents pursuant to Indiana Code section 6-3-2-3.7.<sup>590</sup> The Tax Court determined that the Petitioners' reliance on Indiana Code section 6-3-2-3.7 was misplaced, as Indiana Code section 6-8.1-9-7 clearly requires that every member of a prospective class to a class action lawsuit timely file a claim for refund with the Department.<sup>591</sup> Nonetheless, the Petitioners argued that they were entitled to present their claim as a class action regardless of the fact that members of that class had never filed a claim for refund because Indiana Code section 6-8.1-9-7 was in conflict with Indiana Trial Rule 23.<sup>592</sup> More specifically, the Petitioners claimed that the conflict acted as a bar to Indiana taxpayer's relief, and therefore, Indiana Code section 6-8.1-9-7 should be determined to be invalid.<sup>593</sup> The Tax Court, however, determined that Trial Rule 23 and Indiana Code section 6-8.1-9-7 were not incompatible and both could apply in a given situation. Specifically, the Tax Court determined that Indiana Code section 6-8.1-9-7 did not act to bar individuals from bringing a class action pursuant to Trial Rule 23.<sup>594</sup> Instead, the statute provided a means by which the Department could obtain jurisdiction over the claim against the imposition of the Indiana income tax.<sup>595</sup> The Tax Court determined that, as a matter of policy, the requirement of the exhausting the refund procedure advanced by the statute promoted the natural progression of the claim to the Tax Court and acted to preserve both the Department's and the Tax Court's jurisdiction over the matter.<sup>596</sup> Next, the Tax Court distinguished the Petitioners' reliance on *Clark v. Lee*.<sup>597</sup> Specifically, the Tax Court determined that the Petitioner's reliance on *Clark* was misplaced because *Clark* was decided prior to the General Assembly's enactment of Indiana Code section 6-8.1-9-7.<sup>598</sup> Consequently the Tax Court held that *Clark* was no longer controlling due to the enactment.<sup>599</sup> Alternatively, the Petitioners argued that Indiana Code section 6-8.1-9-7 violated article I, sections 12 and 23 of the Indiana Constitution. First, the Petitioners argued that the burden imposed by requiring taxpayers to comply with Indiana Code section 6-8.1-9-7 was unconstitutionally violative of putative class members protected property interest in claiming their refund. Second, the Petitioners argued that Indiana Code section 6-8.1-9-7 unconstitutionally afforded an advantage to taxpayers filing a class action lawsuit under Indiana Code section 6-8.1-9-7 and to litigants filing a class action lawsuit under Trial

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590. *Id.*

591. *Id.* at 885.

592. *Id.*

593. *Id.* at 886.

594. *Id.*

595. *Id.*

596. *Id.* at 886-87.

597. 406 N.E.2d 646 (Ind. 1980).

598. *Ziegler*, 797 N.E.2d at 887.

599. *Id.* at 888.



Rule 23.<sup>600</sup> In both instances, the Tax Court rejected the arguments advanced by the Petitioners. In the first instance, the Tax Court determined that the exhaustion of administrative remedies required by Indiana Code section 6-8.1-9-7 did not prevent putative litigants from bringing a claim, but rather, it properly maintained the jurisdiction of the case for the Tax Court to properly dispose of when ripe for appeal.<sup>601</sup> Similarly, the Tax Court disposed of the Petitioners' second argument by finding that disparate treatment created by the requirement of administrative exhaustion was uniformly applicable to all Indiana taxpayers as that process was the only way in which a taxpayer could preserve the jurisdiction of the matter for the Tax Court to hear on appeal.<sup>602</sup> Further, the Tax Court determined that this disparate treatment was reasonably related to the State's interest in preserving the integrity of its revenue system. Consequently, the Tax Court denied the Petitioners' motion for partial summary judgment and granted the Department's motion for partial summary judgment.<sup>603</sup>

2. *Eibeck v. Indiana Department of State Revenue*.<sup>604</sup>—Eibeck is an Indiana resident who claimed zero income on his individual state income tax return for the 2000 tax year. Subsequently, the Department assessed Eibeck for unpaid taxes on his pension income received throughout the 2000 tax year which assessment Eibeck timely protested with the Department. After conducting a hearing on the matter, the Department issued a Letter of Findings denying Eibeck's protest. On October 23, 2002, Eibeck initiated an original tax appeal.<sup>605</sup> Eibeck argued that the Department erred in assessing and collecting Indiana income tax on his pension income because Title 26 of the United States Code is not valid law. Specifically, Eibeck cited numerous Internet articles stating that Title 26 has not been enacted as positive law, and therefore, Indiana's taxation scheme is not law.<sup>606</sup> However, the Tax Court determined that Eibeck's reliance on the positive law distinction was in error and only meant that Congress had not yet "reenacted the valid public laws contained in the United State Statutes at Large, which were then codified in the United States Code Under Title 26, into law in the codified form."<sup>607</sup> Regardless of this distinction, the Tax Court determined that, pursuant to the Indiana Constitution, the General Assembly's decision to tax income is critical to Indiana's sovereignty, and therefore, the legitimacy of the General Assembly's enactment of the Adjusted Gross Income Tax Act of 1963 was constitutional.<sup>608</sup> Thus, looking to the definition incorporated into the Adjusted Gross Income Tax Act, the Tax Court determined that "gross income" is "all income from whatever source derived, including (but

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600. *Id.* at 889.

601. *Id.* at 888.

602. *Id.* at 889.

603. *Id.*

604. 799 N.E.2d 1212 (Ind. Tax Ct. 2003).

605. *Id.* at 1213.

606. *Id.*

607. *Id.* at 1213-14.

608. *Id.* at 1214; *see* IND. COST. art. X, § 8.

not limited to) . . . pensions.”<sup>609</sup> Consequently, the Tax Court held that the income tax on Eibeck’s pension was supported by both the Indiana Code and the United States Code and affirmed the Department’s final determination denying Eibeck’s protest.<sup>610</sup>

*G. Indiana Withholding Taxes: Hunt v. Indiana Department  
of State Revenue*<sup>611</sup>

Hunt is the sole shareholder of Hunt’s Health Care Center, Inc., a nursing home located in Fort Wayne, Indiana. In 1988, Hunt’s manager responsible for paying the withholding taxes to the Department quit. Subsequent to that employee’s absence, Hunt issued two checks to the Department for withholding taxes and deposited her own money into the corporation’s bank account to prevent the checks from bouncing.<sup>612</sup> On, March 26, 1998, the Department issued notice to Hunt of withholding taxes due for 1988. Hunt protested the assessment and the Department denied that claim. On October 19, 1999, Hunt initiated her original tax appeal.<sup>613</sup> Hunt’s argument is that she was not an employee of the corporation responsible for paying the withholding taxes to the Department. The test that the Tax Court applied for imposing personal liability for unpaid withholding taxes was whether the individual was an officer, employee, or member of the company, and if so, whether or not that individual had the duty to remit the withholding taxes to the Department.<sup>614</sup> The Tax Court determined that by Hunt’s own admission, she had paid the corporation’s withholding taxes and deposited funds into the corporation’s bank account to prevent them from bouncing.<sup>615</sup> Taken together, these two facts were sufficient for the Tax Court to hold that Hunt was an officer who had the authority, and therefore the duty, to see that the withholding taxes were paid.<sup>616</sup> Alternatively, Hunt argued that the Department’s attempt to hold Hunt personal liable for the withholding taxes ten years after-the-fact is barred by the doctrine of laches. The elements of the doctrine of laches has been determined to be inexcusable delay in asserting a claim of right, an implied waiver arising from knowing acquiescence in existing conditions, and circumstances resulting in prejudice to the adverse party. The Tax Court determined that Hunt failed to establish a valid defense of the doctrine of laches, because she failed to satisfy the first element. Specifically, the Tax Court determined that because the Department had timely notified the corporation of the delinquent withholding taxes in 1988 and 1989, it could be inferred that Hunt, as then replacement manager, had constructive

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609. *Id.* (quoting IND. CODE. § 6-3-1-8 (quoting 26 U.S.C. § 61(a)(11))).

610. *Id.*

611. 790 N.E.2d 630 (Ind. Tax Ct. 2003).

612. *Id.* at 631-32.

613. *Id.*

614. *Id.*

615. *Id.* at 633.

616. *Id.*



notice.<sup>617</sup> Consequently, the Tax Court affirmed the Department's final determination.<sup>618</sup>

*H. Indiana Controlled Substance Excise Tax:  
Ford v. Indiana Department of State Revenue*<sup>619</sup>

Ford is an individual who plead guilty to possession of cocaine on December 20, 1993, which plea was accepted by the court on March 28, 1994. After the State charged Ford with possession of cocaine on September 3 1992, the Department assessed Ford with the Controlled Substance Excise Tax ("CSET") on December 7, 1992. Ford initiated an original tax appeal to the Department's final determination on Ford's protest to the CSET assessment.<sup>620</sup> In general, Ford's argument was that the CSET hearing held by the Department effectively subjected Ford to double jeopardy for his conviction on charges of cocaine possession.<sup>621</sup> The Tax Court disagreed and determined that the Supreme Court of Indiana had clearly ruled that the assessment of the CSET is itself a judgment.<sup>622</sup> Thus, the CSET was actually the first jeopardy against Ford because it predated the plea acceptance by more than one year. Ford next asserted that the CSET assessment was void because he was denied a hearing until six years after his protest on the assessment. Reviewing Indiana Code section 6-8.1-5-1, the Tax Court determined that there is no remedy for a delay of a hearing and the law does not even explicitly define the timing for a hearing on a CSET assessment protest.<sup>623</sup> Thus, Ford's claim was denied and the Department's assessment of the CSET upheld.<sup>624</sup>

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617. *Id.*

618. *Id.* at 634.

619. 779 N.E.2d 1274 (Ind. Tax Ct. 2002).

620. *Id.* at 1276.

621. *Id.*

622. *Id.*; see *Bryant v. State*, 660 N.E.2d 290, 298-99 (Ind. 1995).

623. *Id.* 1277.

624. *Id.*





# RECENT DEVELOPMENTS IN INDIANA TORT LAW

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## INTRODUCTION

This Article surveys the most significant developments in Indiana tort law from October 1, 2002 through September 30, 2003. Indiana appellate courts were called upon not only to re-examine long-standing judicial precedent but also to address issues of first impression.

## I. NEGLIGENCE CASES

### A. Duty

The Indiana Supreme Court addressed a gun owner's duty of care in *Estate of Heck ex rel. Heck v. Stoffer*.<sup>1</sup> Timothy Stoffer had an extensive criminal history, which culminated in his shooting and killing Allen County Police Officer Eryk Heck with a handgun he had taken from his parents' home. Timothy also died as a result of the shoot out.<sup>2</sup>

Timothy's parents were aware of Timothy's criminal activity—to be sure, they were the victims of several of his crimes—but, nonetheless, in the months prior to the killing, Timothy's parents had assisted him in avoiding arrest. Moreover, the Stoffers continued to store their firearm under the cushion of an armchair in their home, to which Timothy had unfettered access.

Heck's Estate ("the Estate") filed a negligence action against the Stoffers and their family-owned business (collectively, "the Stoffers"), which asserted liability for the negligent storage of the firearm.<sup>3</sup> The Stoffers moved to dismiss the claim or, in the alternative, for summary judgment. The trial court granted both the Stoffers' motion to dismiss with prejudice and its alternative motion for summary judgment following several hearings, noting that absent negligent entrustment, when an instrumentality passes from a person's control, responsibility for injuries inflicted by it cease.<sup>4</sup> The Estate then appealed. The Indiana Court of Appeals affirmed the trial court's dismissal, finding that the Stoffers had no duty to securely store their handgun.<sup>5</sup> In reaching this conclusion, the court of appeals relied on the constitutional right to bear arms and the absence of a relevant

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1. 786 N.E.2d 265 (Ind. 2003).

2. *Id.* at 267.

3. *Id.*

4. *Id.*

5. *Id.*; see also *Estate of Heck v. Stoffer*, 752 N.E.2d 192 (Ind. Ct. App. 2001), *vacated*.

statutory duty concerning storage of guns in a home.<sup>6</sup> The supreme court granted transfer and reversed.<sup>7</sup>

In analyzing whether an owner or possessor of a loaded handgun owes a duty to exercise ordinary care in the storage and safekeeping of the handgun, the supreme court turned to the *Webb v. Jarvis* balancing test and focused on the relationship between the parties, the reasonable foreseeability of the harm, and public policy concerns.<sup>8</sup> The supreme court determined that any relationship between Officer Heck and the Stoffers was tenuous at best.<sup>9</sup> Consequently, the supreme court found that the relationship factor weighed in favor of the Stoffers.<sup>10</sup>

Next, the supreme court addressed the foreseeability factor. Refusing to take a narrow view of the foreseeability factor, the supreme court determined that the foreseeability factor weighed in the Estate's favor.<sup>11</sup> In reaching this conclusion, the supreme court cited several facts upon which it relied, including Timothy's history of stealing items from his family, Timothy's three previous charges for resisting law enforcement, Timothy's hiding from the police at the Stoffers' lake cottage, and Timothy's father's belief that Timothy would flee rather than face his sentencing hearing and the admission that he was aware of Timothy's state of mind.<sup>12</sup> The supreme court also noted that, despite the foregoing, the Stoffers failed to take any precautions to secure their gun from Timothy, who still retained a key to their home, although they would hide the gun when their grandchildren would visit and secured their cash, checks, and valuables from Timothy upon his release from prison.<sup>13</sup>

Last, the supreme court examined the public policy factor. After recognizing that in Indiana almost thirteen thousand people were killed or injured by gun violence during the last five years and that thirty-five percent of the crimes involving guns are committed with stolen firearms, the supreme court opined that requiring a gun owner to reduce the risk of gun theft is not overly burdensome.<sup>14</sup> Additionally, the supreme court noted that legislation regarding firearm safety, including the prohibition against selling or transferring a gun to a minor, felon, drug abuser, alcohol abuser, or a mentally incompetent person,<sup>15</sup> acknowledges that a degree of responsibility is associated with handgun ownership.<sup>16</sup> Consequently, the supreme court found that public policy weighs in favor of safe

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6. *Stoffer*, 786 N.E.2d at 267; see also *Stoffer*, 752 N.E.2d at 199.

7. *Stoffer*, 786 N.E.2d at 267.

8. *Id.* at 268 (citing *Webb v. Jarvis*, 575 N.E.2d 992, 996 (Ind. 1991)).

9. *Id.*

10. *Id.*

11. *Id.* at 269.

12. *Id.*

13. *Id.* at 267.

14. *Id.*

15. IND. CODE § 35-47-2-7 (1998).

16. *Stoffer*, 786 N.E.2d at 270.



storage of firearms.<sup>17</sup> After balancing the three factors, the supreme court determined that the Stoffers owed a duty to exercise reasonable and ordinary care in the storage and safekeeping of their handgun.<sup>18</sup> Thus, the supreme court concluded that the trial court erroneously dismissed the cause of action.

The supreme court also examined whether the trial court erred by alternatively granting summary judgment in favor of the Stoffers based on the fact that Timothy's killing of Officer Heck was an intervening act that eliminated the causal connection between the Stoffers' negligence and Officer Heck's death.<sup>19</sup> The supreme court disagreed, finding that a gun owner's duty to safely store his firearm protects against the very result the trial court ruled was an intervening act.<sup>20</sup> The supreme court concluded that the trial court improperly granted summary judgment in favor of the Stoffers, because the supreme court found that Timothy's killing of Officer Heck was not an intervening act that eliminated the causal connection between the Stoffers' negligence and Officer Heck's death and factual determinations remained.<sup>21</sup>

The Indiana Court of Appeals also was presented with a novel duty issue in *Hammock v. Red Gold, Inc.*<sup>22</sup> In *Hammock*, the court of appeals addressed whether a motorist owes a duty of care to a business that loses electricity as a result of the motorist's collision with a utility pole. While Gerald Hammock operated his automobile, he struck a utility pole owned by American Electric Power. As a result of this collision, the Red Gold processing plant located approximately two miles away lost power for nearly five hours and suffered significant losses. Red Gold submitted a claim to its insurer; however, the insurer only covered a portion of Red Gold's total loss.<sup>23</sup> Thus, Red Gold subsequently filed a complaint against Hammock, which alleged that Hammock negligently operated his vehicle, thereby causing Red Gold to suffer substantial losses. Red Gold's insurer filed a motion for summary judgment, which Hammock challenged by asserting that Red Gold was comparatively at fault for failing to have a back-up power source. Additionally, Hammock argued on summary judgment that the damage Red Gold suffered was not foreseeable and that Red Gold's insurer's arguments—namely, that the damage was not foreseeable so as to require Red Gold to have a back-up power source but that the damage was foreseeable for the purpose of establishing the proximate cause element of its negligence claim—were logically inconsistent.<sup>24</sup> Following a

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17. *Id.*

18. *Id.* The supreme court also addressed the role of the right to bear arms. While the supreme court recognized the constitutional right to bear arms, it noted that this right does not entitle gun owners to impose on their fellow citizens all the external human and economic costs associated with their ownership. *Id.* at 270-71.

19. *Id.*

20. *Id.*

21. *Id.*

22. 784 N.E.2d 495 (Ind. Ct. App. 2003), *trans. denied*, 792 N.E.2d 49 (Ind. 2003).

23. *Id.* at 496-97.

24. *Id.* at 497.

hearing, the trial court granted summary judgment for Red Gold's insurer.<sup>25</sup> Hammock appealed raising several issues, of which the court of appeals found one to be dispositive: did Hammock owe a duty to Red Gold?<sup>26</sup>

As a starting point, the court of appeals noted that the existence of a legal duty owed by one party to another in a negligence action is generally a pure question of law.<sup>27</sup> In answering the question of whether Hammock owed a duty to Red Gold, the court of appeals balanced the relationship between the parties, the reasonable foreseeability of harm to the party injured, and public policy concerns.<sup>28</sup>

While unable to identify any special relationship between Hammock and Red Gold, the court of appeals recognized the general relationship that exists between a motorist and the public at large to prevent the motorist from harming them.<sup>29</sup> The court of appeals then analyzed the foreseeability factor, identifying several relevant factors to be considered when discussing the foreseeability that a particular business or residence may be injured as the result of an automobile accident.<sup>30</sup> Ultimately, the court of appeals turned to a "zone of danger" analysis, and based on the fact that the Red Gold plant was located over two miles from the scene of the collision, determined that it was extremely unlikely that the damage suffered by Red Gold was the kind of harm that would normally be expected as the result of an automobile accident.<sup>31</sup>

Next, the court of appeals addressed the public policy considerations involved in holding a motorist liable for the injury suffered by a business following an interruption in electric service.<sup>32</sup> The court of appeals noted that because of the nature of Red Gold's operations Red Gold faced substantial losses if it lost power but nonetheless elected not to have a back-up power source.<sup>33</sup> Because an individual motorist is not in the best position to prevent or minimize the economic harm, the court of appeals found that public policy militates against imposing the costs of the negligent motorist's actions upon the motorist, and instead, might well pass the costs onto the business, which is better able to prevent the harm.<sup>34</sup> Balancing the three factors, the court of appeals concluded that Hammock did not owe a duty to Red Gold and reversed and remanded with instructions for the trial court to enter summary judgment in favor of Hammock.<sup>35</sup>

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25. *Id.*

26. *Id.* at 497-98.

27. *Id.* at 498 (citing *P.T. Barnum's Nightclub v. Duhamell*, 766 N.E.2d 729, 737 (Ind. Ct. App. 2002)).

28. *Id.* at 499 (citing *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991)).

29. *Id.* at 501 (citing RESTATEMENT (SECOND) OF TORTS (1965)).

30. *Id.*

31. *Id.* at 502.

32. *Id.* at 503.

33. *Id.* at 503-04.

34. *Id.* at 504.

35. *Id.* at 506. Judge Bailey dissented, opining that Hammock had a legal duty to use due care to avoid accidents and to keep his vehicle under reasonable control. *Id.*



*B. Dog Bite Cases*

The Indiana Supreme Court issued two opinions during the survey period regarding liability for dog bites. In the first decision, *Poznanski v. Horvath*,<sup>36</sup> the supreme court was asked to address whether the very act of an unprovoked biting by a dog, which in the past displayed no vicious tendencies, is sufficient by itself for a jury to infer that the animal's owner knew, or should have known, of the dog's vicious tendencies.<sup>37</sup> Writing for a unanimous court, Justice Rucker found it was not sufficient.<sup>38</sup>

George Horvath owned a mixed breed sheepdog named Hey.<sup>39</sup> One afternoon while Hey was left unattended and unrestrained in Horvath's yard,<sup>40</sup> the dog—without provocation—bit Alyssa Poznanski on the face. Due to the bite, Alyssa required medical attention and stitches. Subsequently, Alyssa's mother filed suit against Horvath. Horvath then filed a motion for summary judgment, which the trial court granted.<sup>41</sup> The court of appeals reversed and remanded, finding genuine issues of material fact regarding Horvath's knowledge of the dog's vicious propensities, Horvath's use of reasonable care in keeping the dog restrained, and Horvath's liability under the local ordinance requiring animals to be properly restrained.<sup>42</sup> The supreme court granted transfer to address the issue of whether a jury could infer that Horvath knew or should have known of Hey's vicious propensities based on Hey's unprovoked biting of Alyssa, which was the first time Hey exhibited any such vicious behavior.<sup>43</sup>

On transfer, the supreme court rejected the court of appeals' analysis regarding Horvath's knowledge of Hey's vicious propensities.<sup>44</sup> Specifically, the supreme court observed that the very act of unprovoked biting does not necessarily mean a dog is dangerous or vicious, reminding us that under the common law, all dogs are presumed to be harmless domestic animals regardless of breed or size.<sup>45</sup> The supreme court then explained that this presumption can be overcome by evidence of a known or dangerous propensity as shown by

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36. 788 N.E.2d 1255 (Ind. 2003).

37. *Id.* at 1257.

38. *Id.*

39. *Id.*

40. A city ordinance required "[e]very owner . . . of an animal within the City shall see that his or her animal . . . is properly restrained and not at large." *Id.* (alteration in original). The ordinance further defined "at large" as "any animal that is not under restraint." *Id.* The supreme court summarily affirmed the court of appeals' finding that Horvath could be held liable under the local ordinance requiring proper restraint of animals. *Id.*

41. *Id.*

42. *Id.*; see also *Poznanski ex rel. Poznanski v. Horvath*, 749 N.E.2d 1283 (Ind. Ct. App. 2001), *vacated in part* by 788 N.E.2d 1255 (Ind. 2003).

43. *Poznanski*, 788 N.E.2d at 1259.

44. *Id.* at 1258-59.

45. *Id.* at 1258 (citing *Ross v. Lowe*, 619 N.E.2d 911, 914 (Ind. 1993)).

specific acts of the specific animal.<sup>46</sup> The supreme court concluded that a jury may not infer that an owner knew or should have known of a dog's dangerous propensities solely from the fact of a first time bite.<sup>47</sup> Instead, the supreme court determined that a jury may only infer that an owner knew or should have known of a dog's dangerous or vicious propensities following the animal's first unprovoked bite where the evidence establishes that the particular breed to which the owner's dog belongs is known to exhibit such tendencies.<sup>48</sup> Because there was no evidence before the trial court that mixed breed sheepdogs exhibit dangerous or vicious propensities, but there was ample evidence presented that Hey was well-trained and had not exhibited any signs of aggression in the past, the supreme court concluded that the jury could not infer that Horvath knew, or had reason to know, that his dog was vicious or dangerous.<sup>49</sup>

The second dog bite case issued by the supreme court during the survey period was *Cook v. Whitsell-Sherman*.<sup>50</sup> In *Cook*, our supreme court addressed the liability of dog owners whose dogs bite mail carriers and certain other public servants under Indiana Code section 15-5-12-1.<sup>51</sup> As Kenneth Whitsell-Sherman was discharging his duties as a mail carrier for the United States Postal Service, Maggie—a 100-pound Rottweiler—broke free from her leash and bit Whitsell-Sherman on the hand.<sup>52</sup> Maggie had never before exhibited any aggressive or violent tendencies. When Maggie bit Whitsell-Sherman, she was staying with the Hart family while her owner, Tamara Cook, was out of town.

As a result of the injuries he sustained, Whitsell-Sherman sued both Cook, as the owner of the dog, and the Harts, as the keeper of the dog.<sup>53</sup> Following a bench trial, the trial court found that Cook was the owner of the dog, the Harts had custody and control of the dog at the time of the incident, and concluded that Cook was liable for negligence per se and violation of a statutory duty.<sup>54</sup> Cook then appealed.

The Indiana Court of Appeals looked to Indiana Code section 15-5-12-1 and

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46. *Id.*

47. *Id.* at 1260.

48. *Id.*

49. *Id.*

50. 796 N.E.2d 271 (Ind. 2003).

51. *Id.* at 274. Indiana Code section 15-5-12-1 provides:

If a dog, without provocation, bites any person who is peaceably conducting himself in any place where he may be required to go for the purpose of discharging any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States of America, the owner of such dog may be held liable for any damages suffered by the person bitten, regardless of the former viciousness if such dog or the owner's knowledge of such viciousness.

IND. CODE § 15-5-12-1 (1998).

52. *Cook*, 796 N.E.2d at 273.

53. *Id.*

54. *Id.* The Harts failed to appear. Consequently, a default judgment was rendered against them on both Whitsell-Sherman's complaint and Cook's cross claim for indemnity. *Id.*



decided that Cook was the “owner” of the dog for purposes of the statute.<sup>55</sup> However, the court of appeals reversed the trial court’s determination that the statute rendered the owner liable under the doctrine of negligence per se, reasoning that the statute imposed no duty upon Cook and did not alter the common law standard of reasonable care required of dog owners except to eliminate the common law presumption that a dog is harmless.<sup>56</sup> Consequently, the court of appeals concluded that under the general rules of negligence, a public servant who has been bitten by a dog must still establish that the dog’s owner failed to act reasonably to prevent the dog from causing harm.<sup>57</sup>

On transfer, the supreme court examined whether Indiana Code section 15-5-12 renders a dog’s owner liable for a dog bite when the owner is not the custodian of the dog at the time when the bite occurred.<sup>58</sup> As a starting point, the supreme court looked to Indiana Code section 15-5-12-2<sup>59</sup> and determined that Cook was an “owner” of the dog even though she was not the custodian of the dog at the time of the incident.<sup>60</sup> The supreme court explained that such a conclusion seems fair because the owner is ordinarily best positioned to know the dog’s temperament and to give whatever special instructions are necessary to control the dog.<sup>61</sup>

The supreme court next addressed the impact of Indiana Code section 15-5-12-1 on the common law, which presumes all dogs, regardless of breed or size, are harmless.<sup>62</sup> Specifically, the supreme court found that the statute imposes strict liability for failure to prevent dog bite injuries to public employees covered by the statute.<sup>63</sup> The supreme court continued by stating that such strict liability reflects a policy choice that the dog’s owner and keeper should bear the loss rather than the injured public employee.<sup>64</sup> The supreme court concluded by recognizing that the statute’s removal of the presumption of canine harmlessness allows the injured public servant to establish liability by simply proving who the owner is and that the dog bit the public servant without provocation to establish liability.<sup>65</sup>

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55. *Id.* at 274.

56. *Id.*

57. *Id.*

58. *Id.* at 273.

59. *Id.* Indiana Code section 15-5-12-2 provides that “owner” as the term is used in 15-5-12-1 “includes a possessor, keeper, or harbinger of a dog.” *Id.* The statute also explicitly provides, however, that “owner” means the owner of a dog. *Id.* (citing IND. CODE § 15-5-12-2 (1998)).

60. *Id.* at 274.

61. *Id.* at 275.

62. *Poznanski ex rel. Poznanski v. Horvath*, 788 N.E.2d 1255, 1257 (Ind. 2003).

63. *Cook*, 796 N.E.2d at 276.

64. *Id.*

65. *Id.* at 276-77.

## II. PREMISES LIABILITY

In *Baker v. Fenneman & Brown Properties*, the court of appeals addressed the issue of whether a restaurant had a duty to render medical aid to an injured customer.<sup>66</sup> After entering a Taco Bell restaurant to purchase a drink, Baker fell backward and hit his head. The impact rendered him unconscious and caused Baker to convulse. After he regained consciousness, Baker fell again and in addition to losing consciousness, he lacerated his chin, knocked out his four front teeth and cracked the seventh vertebra of his neck. When Baker regained consciousness a second time, he was choking on the blood and teeth in his mouth. Baker stumbled out of the restaurant to a friend, who arranged for Baker to be taken to a hospital.<sup>67</sup>

Baker filed suit against the restaurant claiming that "1) Taco Bell breached its duty to render assistance to him until he could be cared for by others when Taco Bell employees knew or should have known that he was ill or injured, and 2) Taco Bell's conduct constituted gross negligence, wanton disregard and wanton recklessness toward Baker."<sup>68</sup> Taco Bell successfully moved for summary judgment asserting that it had no duty to assist Baker because "it was not responsible for the instrumentality that caused Baker's initial injury."<sup>69</sup>

On appeal, the court noted that the question of duty is a question of law for the court to decide.<sup>70</sup> To determine whether a duty exists, the court must weigh the relationship between the parties, the reasonable foreseeability of harm to the person injured, and public policy concerns.<sup>71</sup> The court next observed that "[a]s a general rule, an individual does not have a duty to aid or protect another person, even if he knows that person needs assistance."<sup>72</sup> Baker argued that there are exceptions to this rule. Specifically, Baker asserted that Taco Bell's duty to assist him is rooted in section 314A of the Restatement (Second) of Torts:

"(1) A common carrier is under a duty to its passengers to take reasonable action:

(a) to protect them against unreasonable risk of physical harm; and  
(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

(2) An innkeeper is under a similar duty to his guests.

(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

(4) One who is required by law to take or who voluntarily takes the

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66. 793 N.E.2d 1203 (Ind. Ct. App. 2003).

67. *Id.* at 1205.

68. *Id.*

69. *Id.* at 1206.

70. *Id.* (citing *Ind. State Police v. Don's Guns & Galleries*, 674 N.E.2d 565, 568 (Ind. Ct. App. 1996)).

71. *Id.*

72. *Id.* (citing *L.S. Ayres v. Hicks*, 40 N.E.2d 334, 337 (Ind. 1942)).



custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.”<sup>73</sup>

In considering section 314A, the court noted that the duty imposed by section 314A arises because of a special relationship between the parties and applies only while the relationship exists.<sup>74</sup> Further, the court noted that comment d to 314A explains that the

“duty to give aid to one who is ill or injured extends to cases where the illness or injury is due to natural causes, to pure accident, to the acts of third person, or to the negligence of the plaintiff himself, as where a passenger has injured himself by clumsily bumping his head against a door.”<sup>75</sup>

The court determined that Indiana precedent did not limit the application of 314A to cases where the injured party is an invitee *and* the instrumentality causing the injury belonged to the defendant.<sup>76</sup> Specifically, the court rejected Taco Bell’s position that it had no duty to assist Baker because it was not responsible for Baker’s initial injury or illness.<sup>77</sup>

The court also held that public policy suggested that Taco Bell had a duty to provide reasonable care to Baker given that Taco Bell opened its doors to the public expecting to gain an economic benefit from its patrons.<sup>78</sup> The court countered Taco Bell’s position that the imposed duty was unreasonable because it would require businesses to hire employees trained to render medical treatment by emphasizing that the duty that arises is only a duty to exercise reasonable care under the circumstances.<sup>79</sup> Finally, the court opined that:

[A]s a practical matter, we fail to see the logic in Taco Bell’s position that it should have no duty to aid in these types of situations. First, we find it unlikely customers would patronize a business that left another customer who was ill or injured lying on the floor of the business simply because the business was not responsible for the customer’s illness or injury. Second, imposing on a business a duty to provide reasonable care even when the business is not responsible for an illness or injury will rarely force a business to act in circumstances in which it should not have already have been acting.<sup>80</sup>

Relying on Indiana case law, the Restatement (Second) of Torts, authority from

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73. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 314 A (1965)).

74. *Id.* at 1207.

75. *Id.* at 1208 (quoting RESTATEMENT (SECOND) OF TORTS § 314A cmt. d (1965)).

76. *Id.*

77. *Id.*

78. *Id.* at 1209.

79. *Id.*

80. *Id.* at 1210.

other jurisdictions and public policy, the court determined that Taco Bell had a duty to provide reasonable assistance to Baker even though Taco Bell did not cause Baker's illness.

In *Smith v. Baxter*,<sup>81</sup> the plaintiff slipped and fell off of a ladder on the defendants' land. The matter was tried and the jury awarded the plaintiff \$600,000 in damages after finding the plaintiff forty percent at fault and the defendants sixty percent at fault with regard to the fall.<sup>82</sup> The defendants appealed the trial court's denial of their motion for judgment on the evidence. The court of appeals reversed the trial court in a memorandum decision and the supreme court accepted transfer.<sup>83</sup>

The defendants argued that, because the plaintiff's knowledge of the ladder's deficiencies was equal to or greater than that of the defendants, the defendants had not breached their duty of care to the plaintiff.<sup>84</sup> The plaintiff countered that, under the Indiana Comparative Fault Act, incurred risk was not a complete defense and "requires that conduct previously constituting the defense of incurred risk must now be apportioned along with the fault of others in determining liability."<sup>85</sup> The court observed that

[r]esolution of the parties' disagreement requires us to determine, in the analysis of a negligence claim, the proper role of the parties' relative knowledge of the risks involved. The question is whether such knowledge is relevant not only to apportioning fault but also to determining whether the defendants breached their duty of reasonable care.<sup>86</sup>

Consistent with existing precedent, the court noted that "the comparative knowledge of a possessor of land and an invitee is not a factor in assessing whether a duty exists, but it is properly taken into consideration in determining whether such duty was breached."<sup>87</sup> In reviewing Indiana case law and sections 343 and 343A of the Restatement (Second) of Torts, the court held that Indiana's Comparative Fault Act did not alter the fact that the court may still consider the comparative knowledge of possessors of land and invitees regarding known or obvious dangers in the court's analysis of the possessor's alleged breach of the duty of reasonable care.<sup>88</sup> The court further noted that in order for the defendants

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81. 796 N.E.2d 242 (Ind. 2003).

82. *Id.* at 243.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* (citing *Douglass v. Irvin*, 549 N.E.2d 368 (Ind. 1990)).

88. *Id.* at 244-45. Restatement (Second) of Torts section 343 provides:

Dangerous Conditions Known to or Discoverable by a Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he:

(a) knows or by the exercise of reasonable care would discover the condition,



to successfully appeal the trial court's denial of their motion for judgment on the evidence, the defendants must establish that there is no substantial evidence supporting an essential issue in this case.<sup>89</sup>

The defendants maintained that the plaintiff was as familiar with the ladder as they were on the date of the incident. The defendants also asserted that the plaintiff had experience in climbing a variety of ladders and would have declined to climb their ladder had it posed an "unreasonable risk."<sup>90</sup> Moreover, the defendants argued that liability may not be imposed on a possessor of land under section 343 and 343A, unless "an invitee's conduct notwithstanding the known or obvious risk [is] undertaken for a 'type of strong, external compelling circumstance.'"<sup>91</sup> The supreme court rejected the defendants' position that an invitee's conduct must be undertaken for compelling circumstances.<sup>92</sup>

The court concluded that substantial evidence existed as to whether the defendants knew or should have known that climbing the ladder posed an unreasonable risk of harm.<sup>93</sup> The court further noted that:

It is a much closer question as to whether there was substantial evidence that (1) the defendants should have expected that the plaintiff would not discover or realize the danger, or fail to protect himself against it, and (2) the defendants should have anticipated the harm despite the plaintiff's knowledge or the obvious nature of the risk. Because we must look only to the evidence and the reasonable inferences most favorable to the

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and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

RESTATEMENT (SECOND) OF TORTS § 343.

Restatement (Second) of Torts section 343A provides:

Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

RESTATEMENT (SECOND) OF TORTS § 343(A).

89. *Smith*, 796 N.E.2d at 245.

90. *Id.*

91. *Id.* (quoting *Tate v. Cambridge Commons Apartments*, 712 N.E.2d 525, 528 (Ind. Ct. App. 1999)).

92. *Id.*

93. *Id.* at 246.

plaintiff as a non-moving party, and because the motion for judgment on the evidence is proper only where there is no substantial evidence supporting an essential issue in the case, we decline to reverse the trial court.<sup>94</sup>

In affirming the judgment of the trial court, the supreme court held that resolution of the matter was properly left to the determination of the jury.<sup>95</sup>

### III. MEDICAL MALPRACTICE

#### *A. Statute of Limitations*

In *Booth v. Wiley*,<sup>96</sup> the Indiana Court of Appeals addressed the discovery based statute of limitations. On October 26, 1998, Dr. Norlund, an optometrist, recommended that Booth undergo Lasik surgery due to his poor vision. Dr. Norlund assured Booth that his disclosed history of glaucoma and cataracts did not preclude him from being a candidate for Lasik surgery.<sup>97</sup>

On November 2, 1998, Dr. Wiley performed bi-lateral Lasik surgery on Booth. Because Booth was not satisfied with the improvement in his vision, Dr. Wiley performed laser enhancement surgery on February 8, 1999. On May 4, 1999, Dr. Wiley performed cataract surgery on Booth's right eye. Two additional surgeries, on May 11, 1999, and on August 2, 1999, were necessary to complete the implantation of an intraocular lens in Booth's right eye.<sup>98</sup>

Booth continued to experience poor vision. When he questioned Dr. Wiley about his sight problems, Dr. Wiley advised Booth that he may have suffered a series of mini strokes that affected the vision in his right eye. Consequently, Booth was referred to Dr. Chern, a retinal vitreous specialist. Dr. Chern examined Booth on October 5, 1999, and found various problems with Booth's right eye. Thereafter, Booth began experiencing problems with his left eye and asked Dr. Wiley for a referral to another physician.<sup>99</sup>

On December 4, 2000, Booth met with Dr. Parent, an ophthalmologist that informed Booth that he should not have had Lasik surgery because it was not indicated for a patient with pre-existing glaucoma and cataracts. Dr. Parent performed cataract surgery on Booth's left eye on February 13, 2001.<sup>100</sup>

On April 9, 2001, Booth and his wife met with an attorney who filed their medical negligence complaint on July 24, 2001. The complaint also included claims under the doctrine of fraudulent concealment and the Indiana Deceptive Consumer Sales Act.<sup>101</sup> The complaint was filed with the Indiana Department of

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94. *Id.*

95. *Id.*

96. 793 N.E.2d 1104 (Ind. Ct. App. 2003).

97. *Id.* at 1105.

98. *Id.*

99. *Id.*

100. *Id.* at 1106.

101. *Id.*



Insurance on September 18, 2001.<sup>102</sup>

Thereafter, the defendant physicians successfully moved for summary judgment alleging that the Booths' claims were time-barred.<sup>103</sup> The trial court reasoned that

the occurrence-based limitation period is constitutional as applied to Booth, who in this case, should have reasonably been expected to learn of his injury in October 1999 [when Booth saw Dr. Chern]. The statute of limitations did not shorten the time between the discovery of the alleged mistake and the expiration of the limitation period so unreasonably that it became impractical for Booth to file his claim.<sup>104</sup>

The central issue for the court of appeals was to determine the date Booth knew or should have known that the Lasik surgery should not have been performed on him and was the cause of his continued vision complaints.<sup>105</sup> The physicians argued that Dr. Chern's assessment of Booth's eyes in October of 1999, should have alerted Booth that his poor vision was related to the Lasik surgery. Thus, the doctors asserted, a complaint filed by Booth after October of 2001 was time-barred.<sup>106</sup>

Dr. Wiley further opined that if Booth's vision loss was attributable to the lens implant surgery of May 11, 1999, the statute of limitations on Booth's claim expired on May 11, 2001. Moreover, Dr. Norlund and Midwest Eye argued that because the last Lasik surgery was performed on February 8, 1999, that Booth had to file his claims on or before February 8, 2001. Booth maintained that, because he was unaware of the relationship between the Lasik surgery and his impaired vision until Dr. Parent advised him of the connection on December 4, 2000, the filing of his complaint on July 24, 2001, was timely.<sup>107</sup>

In its analysis, the court observed that there are certain circumstances when the occurrence-based statute of limitations "is unconstitutional as applied to plaintiffs who, in the exercise of reasonable diligence, could not have discovered the alleged malpractice within the two-year limitation period."<sup>108</sup> In such instances, a plaintiff has two full years from the date "they discover the malpractice and resulting injury or facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury."<sup>109</sup>

The court then looked to the holdings in *Boggs v. Tri-State Radiology, Inc.*<sup>110</sup>

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102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 1106-07 (quoting *Van Dusen v. Stotts*, 712 N.E.2d 491, 493 (Ind. 1999)).

110. 730 N.E.2d 692 (Ind. 2000).

and *Rogers v. Mendel*.<sup>111</sup> In *Boggs*, the Indiana Supreme Court considered the scenario wherein a plaintiff cannot reasonably be expected to learn of the injury when the alleged malpractice occurs but nevertheless discovers the injury before the statute of limitations expires.<sup>112</sup> The court held that

“as long as the statute of limitations does not shorten this window of time [between the discovery of the alleged malpractice and the expiration of the limitation period] so unreasonably that it is impractical for a plaintiff to file a claim at all . . . it is constitutional as applied to that plaintiff.”<sup>113</sup>

In *Rogers*, the Indiana Court of Appeals set forth a two-part analysis in applying the two-year malpractice statute of limitations.<sup>114</sup> The first inquiry is “whether the plaintiff discovered the alleged malpractice and resulting injury, or possessed information that through the exercise of reasonable diligence would have led to such discovery, within the limitation period.”<sup>115</sup> If the answer is affirmative, then the limitation period is constitutional as applied, so long as the claim can reasonably be asserted in the time that remains.<sup>116</sup>

If, however, the discovery of the alleged malpractice occurs after the limitation period has expired, then the analysis rests in when the plaintiff acquired the information that in the exercise of due diligence, would have led to the discovery of the alleged malpractice.<sup>117</sup> The answer to this question is determinative of the date on which the full two-year period begins to run.<sup>118</sup>

In applying the precedent set forth in *Boggs* and *Rogers* to this case, the court first questioned whether Booth discovered the alleged malpractice “on October 5, 1999, when he learned his vision loss was permanent, or December 4, 2000, when Dr. Parent informed him that Lasik surgery should not have been performed.”<sup>119</sup> Although a plaintiff need not know with certainty that malpractice has occurred, the court reasoned that a plaintiff must be informed by a doctor of a possible causal link between her injury and the negligence. Thus, there must be something more than mere suspicion by a plaintiff that is without technical or medical knowledge.<sup>120</sup>

The court noted that, prior to December 4, 2000, the record lacked any evidence that Booth was informed that Lasik surgery was not recommended for patients with glaucoma and cataracts.<sup>121</sup> The court also observed that Dr. Wiley

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111. 758 N.E.2d 946 (Ind. Ct. App. 2001).

112. *Booth*, 793 N.E.2d at 1107.

113. *Id.* (quoting *Boggs*, 730 N.E.2d at 695).

114. *Id.* (citing *Rogers*, 758 N.E.2d at 951).

115. *Id.* (citing *Rogers*, 758 N.E.2d at 951).

116. *Id.* (citing *Rogers*, 758 N.E.2d at 951).

117. *Id.* (citing *Rogers*, 758 N.E.2d at 952).

118. *Id.*

119. *Id.*

120. *Id.* at 1108 (citing *Van Dusen v. Stotts*, 712 N.E.2d 491, 498 (Ind. 1999)).

121. *Id.*



had given Booth reason to believe his vision problems may have resulted from his cataracts, glaucoma or mini strokes. Further, Dr. Chern's diagnosis of permanent vision loss did not give Booth, who lacked medical knowledge, a reason to suspect that malpractice may have occurred due to the Lasik surgery.<sup>122</sup>

Concluding that Booth's Lasik surgery took place on February 8, 1999, and that he discovered the cause of the malpractice on December 4, 2000, the court found that Booth had approximately two months to file his claim before the limitation period expired.<sup>123</sup> Because Booth learned of the malpractice shortly before the limitation period expired, the court had to evaluate whether Booth was faced with "the practical impossibility" of asserting the claim before the limitation period expired.<sup>124</sup>

The court held that two months was not enough time for the Booths to locate an attorney willing to represent them and have time to investigate the claim. Booth met with an attorney within two months of his last cataract surgery and the attorney met with Dr. Parent within five weeks of being retained by the Booths. A complaint was filed less than two months later.<sup>125</sup>

The court was not persuaded by Dr. Wiley's argument that, because the Booths also asserted a claim regarding the insertion of the intra-ocular lens on May 11, 1999, the Booths only had until May 11, 2001 to bring that claim.<sup>126</sup> The court rejected Dr. Wiley's arguments stating that "[w]e have determined that Booth became aware of the potential malpractice on December 4, 2000, five months before the expiration of the statute of limitations under Dr. Wiley's argument. We find that, under the facts of this case, a five-month delay is not unreasonable."<sup>127</sup> Holding that the Booths filed their complaint within the two year statute of limitations, the court reversed the trial court and remanded the matter for further proceedings.

In *Randolph v. Methodist Hospitals, Inc.*,<sup>128</sup> in a case of first impression, the court of appeals held that the exception to the statute of limitations giving a minor until the age of eight to bring an action against a health care provider applies only to living children.<sup>129</sup> On October 7, 1991, Kwabene Randolph was born with a severe brain injury. Kwabene's condition did not improve and he passed away on May 7, 1992. More than five years later, a special administration was opened on Kwabene's behalf for the sole purpose of collecting damages in a wrongful death suit based on medical malpractice. On September 26, 1997, Charlotte Randolph, Kwabene's mother, filed a medical malpractice complaint with the Department of Insurance individually and as next friend of Kwabene.<sup>130</sup>

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122. *Id.*

123. *Id.*

124. *Id.* (quoting *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692, 697 (Ind. 2000)).

125. *Id.* at 1108-09.

126. *Id.* at 1109.

127. *Id.*

128. 793 N.E.2d 231 (Ind. 2003).

129. *Id.* at 235.

130. *Id.* at 233.

In July 2002, defendant Methodist Hospital filed a Complaint and Motion for Preliminary Determination of Law under the Indiana Medical Malpractice Act based on its contention that the plaintiffs' proposed complaint was time-barred.<sup>131</sup> The issue was briefed by the parties, including all of the other defendant health care providers. The trial court determined that the action was properly brought by Charlotte Randolph, as the personal representative of the deceased child's estate; however, the court found that the claims were time-barred by the Medical Malpractice Act's two-year statute of limitations. All of the plaintiff's claims were dismissed.<sup>132</sup>

On appeal, the appellants argued that, because Kwabene's injuries occurred prior to what would have been his sixth birthday, his representatives had until his eighth birthday to file his claim for damages.<sup>133</sup> This exception to the medical malpractice statute of limitations is set forth in Indiana Code section 34-18-7-1. The statute reads:

A claim, whether in contract or tort, may not be brought against a health care provider based upon professional services or health care that was provided or that should have been provided unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect, except that a minor less than six (6) years of age has until the minor's eighth birthday to file.<sup>134</sup>

The health care providers argued, as they had successfully before the trial court, that the exception carved out in Indiana Code section 34-18-7-1 applies only to living children.<sup>135</sup> Because the application of Indiana Code section 34-18-7-1 to deceased children was a matter of first impression in Indiana, the court looked to other jurisdictions for guidance in deciding this issue.<sup>136</sup> The court reviewed similar statutes and cases in Pennsylvania and Wisconsin. The court of appeals was persuaded by both jurisdictions' reasoning in finding that the respective exceptions to the medical malpractice statute of limitations for minors was intended to apply only to living children.<sup>137</sup> Adopting that rationale, the court found that Kwabene's claims should be analyzed under the general medical malpractice statute of limitations; therefore, Kwabene's claims "expired two years after the occurrence that caused his injuries and death—his birth on October 7, 1991."<sup>138</sup>

The court further noted that when a statute is unambiguous, its plain and clear meaning should be applied.<sup>139</sup> The court determined that because the plain

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131. *Id.*

132. *Id.* at 234.

133. *Id.*

134. IND. CODE § 34-18-7-1 (1998).

135. *Randolph*, 793 N.E.2d at 234.

136. *Id.* at 234-36.

137. *Id.* at 235-36.

138. *Id.*

139. *Id.* at 236.



language of the exception provision only applies to actions actually brought by the minor, the exception could only apply to a child alive at the time the cause of action is filed.<sup>140</sup>

Charlotte Randolph conceded that her claims were derivative to her son's claims; thereby, her claims expired when her son's claims expired. Because the court held that Kwabene's claims expired two years after his birth, it followed that Randolph's claims expired at the same time.<sup>141</sup> The court further noted that the medical malpractice statute of limitations, not the wrongful death act statute of limitations, applies in cases where the wrongful death resulted from the medical malpractice.<sup>142</sup> Because Randolph's claims were based in medical malpractice and were derivative of her son's claims, her claims expired along with Kwabene's claims, on October 7, 1993.

### *B. Use of Decedent's Affidavit in Summary Judgment Proceeding*

In another case of first impression, *Reeder v. Harper*, the Indiana Supreme Court held that a deceased physician's affidavit, which would be inadmissible at trial, could be considered at the summary judgment stage, given that the substance of the affidavit would be admissible in another form at trial.<sup>143</sup>

Denise Harper and her husband, Dennis Harper, filed a medical negligence complaint against three physicians for failing to diagnose and treat Denise's breast cancer. After Denise died, Dennis continued the claim, joined by Denise's estate. The complaint was further amended to allege both a survivorship action and a wrongful death action.

The Medical Review Panel found that certain healthcare providers deviated from the standard of care in their treatment of Denise Palmer but that the deviations did not alter the course of the patient's care or hasten her death. Thereafter, those healthcare providers moved for summary judgment, relying in part on the panel opinion.<sup>144</sup>

In their opposition to summary judgment, the plaintiffs designated the affidavit of Dr. Alpern, whose opinions contradicted the panel's findings. After a hearing, the plaintiffs successfully defeated summary judgment. Approximately one year later, Dr. Alpern died.

After Dr. Alpern's death, the defendants renewed their motion for summary judgment. The plaintiffs again designated Dr. Alpern's affidavit. This time, the trial court granted the defendants' motions for summary judgment.<sup>145</sup> Finding that the only evidence the plaintiffs designated regarding causation for both the survivorship and wrongful death claims was the affidavit of Dr. Alpern, the court of appeals affirmed the trial court's grant of summary judgment in the

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140. *Id.*

141. *Id.*

142. *Id.* at 237.

143. 788 N.E.2d 1236 (Ind. 2003).

144. *Id.* at 1239.

145. *Id.*

defendants' favor.<sup>146</sup>

Applying the same standard of review as used in the trial court, the supreme court reversed the grant of summary judgment in the defendants' favor.<sup>147</sup> In reversing the lower courts, the supreme court looked at the plain language of Trial Rule 56(E); specifically, the court considered that "[s]upporting and opposing affidavits shall be made on personal knowledge, *shall set forth such facts as would be admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."<sup>148</sup> The court next observed that "declarations of a decedent offered at trial as proof of their contents are hearsay and thus inadmissible as such unless falling within one of the exceptions to the hearsay rule."<sup>149</sup>

In resolving the "first impression" issue of whether, in the summary judgment context, there is a distinction between "hearsay affidavit offered as evidence on the one hand versus the facts established by the affidavit on the other," the court looked to federal opinions for guidance.<sup>150</sup>

The United States Supreme Court has held that some forms of affidavit that would be inadmissible at trial may be considered at the summary judgment stage.<sup>151</sup> Federal courts have also held that not considering a deceased's affidavit at the summary judgment stage confuses the issue by reading a cross-examination requirement into Rule 56 that is not there.<sup>152</sup>

The Indiana Supreme Court also noted that "[a]lthough the affidavit would not be admissible at trial, there is nothing in the record before us suggesting that the substance of the affidavit would not be admissible at trial in another form—most likely, the testimony of another expert witness."<sup>153</sup> The court concluded that even if an affidavit would be inadmissible at trial, it may be considered during summary judgment proceedings, so long as the substance of the affidavit is admissible in some other form at trial.<sup>154</sup> Holding that the trial court should have considered Dr. Alpern's affidavit in its summary judgment ruling, the court opined that

[t]o hold otherwise and embrace the view that the death of an affiant renders an affidavit a nullity would result in summary judgment where the opposing party had the misfortune to select the one short-lived witness from among the many who may be able to testify to the same thing. We do not believe that Indiana Trial Rule 56(E) should be read

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146. *Id.* at 1239-40.

147. *Id.* at 1240.

148. *Id.* (citing IND. T.R. 56(E) (alteration in original)).

149. *Id.* (citing *Am. United Life Ins. Co. v. Peffley*, 301 N.E.2d 651, 658 (Ind. 1973)).

150. *Id.*

151. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

152. *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 604-05 (7th Cir. 2000).

153. *Reeder*, 788 N.E.2d. at 1242.

154. *Id.* at 1241-42.



so narrowly.<sup>155</sup>

The court concluded its opinion by finding that Dr. Alpern's affidavit created a genuine issue of material fact that made summary judgment on the plaintiffs' wrongful death claims inappropriate. Further, the court concluded that Dennis Palmer's affidavit created genuine issues of fact regarding his deceased wife's mental anguish and physical pain; thereby, making summary judgment inappropriate on the plaintiffs' survivorship claims.<sup>156</sup>

### *C. Right to Be Present in Court*

In *Jordan v. Deery*, the Indiana Supreme Court held that the constitutional right to a jury trial entitled a minor plaintiff to be present in the courtroom during both the liability and damage phase of a medical malpractice action against healthcare providers.<sup>157</sup>

Following a delivery that resulted in fetal distress, asphyxia, cerebral palsy and Erb's palsy of the left arm, the parents of Shelamiah Jordan filed a medical negligence suit against various healthcare providers. After a unanimous medical review panel opinion in favor of the healthcare providers, the Jordans—on their own behalf and acting as Shelamiah's next friends—filed their complaint for medical negligence in the trial court.<sup>158</sup> Thereafter, the healthcare providers successfully moved for summary judgment. The court of appeals affirmed the trial court's grant of summary judgment in the defendants' favor, and the Indiana Supreme Court accepted transfer.<sup>159</sup> On transfer, the supreme court found that the trial court properly granted summary judgment on the parents' claims due to the statute of limitations. However, the supreme court determined that the motion was improperly granted as to Shelamiah's claims and remanded the cause for trial.<sup>160</sup>

The trial court granted the defendants' motion to bifurcate the liability and damages phases of the trial.<sup>161</sup> The defendant healthcare providers next moved for an order in limine alleging that Shelamiah should be excluded from the courtroom during the liability phase of the trial as she was "unable to consult with counsel, and her presence would prejudice the jury."<sup>162</sup> In support of their motion, the defendants relied upon *Gage v. Bozarth*,<sup>163</sup> in which the Indiana Court of Appeals adopted a two-pronged test that must be satisfied before a trial court may exclude a plaintiff from the courtroom during the liability phase of a trial. First, the party seeking the exclusion must show that the plaintiff's

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155. *Id.* at 1242.

156. *Id.* at 1242-43.

157. 778 N.E.2d 1264 (Ind. 2002).

158. *Id.* at 1266.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. 505 N.E.2d 64 (Ind. Ct. App. 1987), *abrogated by Jordan*, 778 N.E.2d at 1264.

presence has a potentially prejudicial effect on the jury.<sup>164</sup> Second, "the trial court must determine whether the plaintiff can understand the proceedings and assist counsel in any meaningful way . . . if the trial court finds that the plaintiff can understand the proceedings and aid counsel, the plaintiff cannot be excluded regardless of prejudicial impact."<sup>165</sup>

Shelamiah countered the defendants' motion in limine by arguing that *Gage* did not survive the enactment of the American with Disabilities Act of 1990.<sup>166</sup> After a series of procedural battles that ended in the defendants' favor, the case was tried before a jury and resulted in a defense verdict.<sup>167</sup> On appeal, the court of appeals affirmed the trial court's decision to exclude Shelamiah from the courtroom during the liability phase of the trial concluding that "the *Gage* test survived the enactment of the ADA and that the test was satisfied in this case."<sup>168</sup>

On transfer, the supreme court reversed the judgment of the trial court, concluding that *Gage* was no longer good law.<sup>169</sup> The court's decision, however, was not based upon the ADA, but was instead rooted in article I, section 20 of the Indiana Constitution. This section provides: "In all civil cases, the right to trial by jury shall remain inviolate."<sup>170</sup>

In a 4-1 opinion, the supreme court held that

[i]n our view, the right to be present in the courtroom during both the liability and damage phase of trial is so basic and fundamental that it is, by implication, guaranteed by Article I, Section 20 . . . . Absent waiver or extraordinary circumstances, a party may not be so excluded. Because neither waiver nor extraordinary circumstances exist here, the judgment of the trial court is reversed and this cause remanded for a new trial.<sup>171</sup>

#### IV. WRONGFUL BIRTH

In *Chaffee v. Seslar*, the Indiana Supreme Court accepted transfer of an interlocutory appeal to consider whether damages recoverable pursuant to a claim for an alleged negligent sterilization procedure may include the costs of raising and educating a normal, healthy child conceived after the procedure.<sup>172</sup> On transfer, the court considered whether such damages were appropriate and whether its recent decision in *Bader v. Johnson*,<sup>173</sup> compelled the recognition of

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164. *Id.* at 67.

165. *Id.*

166. *Jordan*, 778 N.E.2d at 1266-67.

167. *Id.* at 1267.

168. *Id.*

169. *Id.* at 1267-68.

170. IND. CONST. art. I, § 20.

171. *Jordan*, 778 N.E.2d at 1272.

172. 786 N.E.2d 705 (Ind. 2003).

173. 732 N.E.2d 1212 (Ind. 2000). In *Bader*, a couple claimed that the defendants' failure to



such recovery.<sup>174</sup>

In addition to its consideration of its holding in *Bader*, the supreme court examined recovery other jurisdictions have permitted in wrongful birth cases. Some states allow recovery for the costs of rearing a normal, healthy child with no offset for the benefit conferred by the presence of the child. Other courts permit recovery for the costs of rearing a child; provided that the damages awarded reflect an offset for the benefits the parents receive from the child's presence.<sup>175</sup> The majority of jurisdictions, however, hold that the parents may not recover damages for child rearing—limiting recovery to pregnancy and childbearing expenses.<sup>176</sup>

Ultimately, the court subscribed to the latter position, noting that

[a]lthough raising an unplanned child, or any child for that matter, is costly, we nevertheless believe that all human life is presumptively invaluable . . . [w]e hold that the costs involved in raising and educating a normal, healthy child conceived subsequent to an allegedly negligent sterilization procedure are not cognizable as damages in action for medical negligence.<sup>177</sup>

## V. WRONGFUL DEATH

In *Deaconess Hospital, Inc. v. Gruber*, the Indiana Court of Appeals addressed whether an adult daughter was dependent under the Indiana Wrongful Death Act.<sup>178</sup> Irma Lawson and her adult daughter, Gunthild Gruber, were partners in operating a restaurant together in Mt. Vernon, Indiana for more than thirty-five years. Both women worked at the restaurant and paid various living expenses out of the restaurant accounts.

Mother and daughter split the restaurant profits equally until 1994. From 1995 to 1999, Gunthild received sixty percent of the profits and Irma received the remaining profits. Although Irma worked more hours than Gunthild, the record contained evidence that Irma wanted Gunthild to have a higher percentage of the restaurant's profits because Gunthild had a husband and two children. Gunthild also testified that Irma wanted Gunthild to have the majority of the profits to make up for the material things Gunthild was deprived of in her childhood.<sup>179</sup>

In 1999, Irma died. Gunthild filed a wrongful death action alleging failure

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report adverse prenatal test results deprived them of the opportunity to terminate their pregnancy. The couple sought various damages, including costs associated with the pregnancy and medical costs attributable to the birth defects during the child's minority. In *Bader*, the court was not asked to consider whether the parents could recover anticipated ordinary costs of raising the child.

174. *Chaffee*, 786 N.E.2d at 706.

175. *Id.*

176. *Id.* at 708.

177. *Id.* at 708-09.

178. 791 N.E.2d 841 (Ind. Ct. App. 2003).

179. *Id.*

to provide timely medical care.<sup>180</sup> The defendants filed a motion for partial summary judgment arguing that since Irma had no dependents, recovery under the Indiana Wrongful Death Act was limited to recovery of reasonable medical, hospital, funeral and burial expenses, and costs of administration.

In this case, the court found that there was evidence to support the conclusion that:

[T]he economic loss occasioned by the death of the decedent was more than a simple loss to the business in which she participated. Rather, there is evidence that the decedent essentially took most of the income to which she was entitled from her business efforts and gave it to the Respondent for her use. Consequently, the [c]ourt finds that there are genuine issues of material fact in this case on the issue of dependency.<sup>181</sup>

On appeal, the court observed that the Indiana Supreme Court has defined the standard for establishing dependency in wrongful death actions by stating that “proof of dependency must show a need or necessity of support on the part of the person alleged to be dependent . . . coupled with the contribution to such support by the deceased.”<sup>182</sup> Hence, the court focused its analysis on whether genuine issues of material fact existed regarding: “(1) ‘a need or necessity of support on the part of’ Gunthild; and (2) Irma’s contributions to such support.”<sup>183</sup>

The defendants argued that Gunthild was able-bodied, self-sufficient and fully-employed. Pointing out that Gunthild’s yearly income was \$62,696 prior to her mother’s death and exceeded \$100,000 after her mother’s death, the defendants argued that Gunthild’s “need” was actually an “expectation” and not a necessity.<sup>184</sup> Gunthild countered the defendants’ position by asserting that she was partially dependent on Irma. Although the court of appeals agreed that partial dependency was sufficient, the court found that Gunthild had not designated evidence to support recovery as Irma’s partial dependent.<sup>185</sup>

In partial dependency, the contribution must be “more than just a service or benefit to which the claimed dependent has become accustomed . . . [s]ervices must go beyond merely helping family members, even those who have relied on the assistance.”<sup>186</sup> Because Gunthild, her husband and her two adult children, were all able-bodied and self-sufficient, the court determined that Irma’s alleged support was more akin to a gift or act of generosity.<sup>187</sup> Although the court determined that Gunthild was not Irma’s “dependent” because she failed to establish an actual need for Irma’s support, the court proceeded with the second part of its analysis—Irma’s contribution to Gunthild’s support.

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180. *Id.*

181. *Id.* at 844.

182. *Id.* at 845 (quoting *N.Y. Cent. R.R. v. Johnson*, 127 N.E.2d 603, 607 (Ind. 1955)).

183. *Id.* (quoting *Johnson*, 127 N.E.2d at 607).

184. *Id.* at 845-46.

185. *Id.* at 846.

186. *Id.* (quoting *Estate of Sears ex rel. Sears v. Griffin*, 771 N.E.2d 1136, 1139 (Ind. 2002)).

187. *Id.* at 847.



The defendants maintained that Irma's contributions were rendered to the partnership and not directly to Gunthild.<sup>188</sup> Gunthild contended that contributions to establish dependency may be non-economic damages, such as love, care, affection, and services.<sup>189</sup> The court rejected Gunthild's position finding that no precedent existed establishing that emotional support may be the sole basis for dependency. The court further noted that Gunthild's position confused the establishment of dependency with the damages that are available if dependency is established.<sup>190</sup> Finding that Gunthild failed to designate evidence both of her need for support and of Irma's contributions to such support—the court held that the defendants were entitled to partial summary judgment as a matter of law.

## VI. UNDERINSURED/UNINSURED MOTORIST COVERAGE

The Indiana Court of Appeals addressed whether an insured should be entitled to uninsured motorist coverage when the motorist is involved in a collision caused by debris in a roadway in *Will v. Meridian Insurance Group, Inc.*<sup>191</sup> As Melissa Will was driving her father's automobile, she encountered a four to five foot pile of debris in the roadway. Will hit the pile of debris, the car went airborne, and then rolled over four or five times. Will and her passenger were both injured in the collision.<sup>192</sup>

Will submitted a claim to Meridian Insurance Group ("Meridian"), the insurer of her father's automobile, under the uninsured motorist provision of her father's policy. The policy's uninsured motorist provision defined an uninsured motor vehicle in pertinent part as "a hit-and-run vehicle whose owner or operator cannot be identified" and which "hits" the insured or a family member, an automobile which the insured or a family member is occupying, or the insured's covered automobile.<sup>193</sup> Meridian denied coverage. Subsequently, Will filed an action against Meridian, alleging that the pile of debris had been left on the roadway by an unidentified motorist, that the unidentified motorist was an uninsured motorist under the terms of Meridian's policy, and that Meridian refused to pay for the injuries caused by the uninsured motorist. In response, Meridian filed a motion for summary judgment, which the trial court granted.<sup>194</sup> Will then appealed, asserting that the trial court should not have granted summary judgment in Meridian's favor because there was a question of fact as to whether there was "indirect" physical contact between her father's automobile and an unidentified automobile.<sup>195</sup>

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188. *Id.*

189. *Id.*

190. *Id.* at 847-48.

191. 776 N.E.2d 1233 (Ind. Ct. App. 2002).

192. *Id.*

193. *Id.* at 1234.

194. *Id.*

195. *Id.* at 1235.

The court of appeals reversed, beginning its analysis by noting that the uninsured motorist policy at issue was ambiguous and therefore the language should be interpreted by reference to extrinsic facts to ascertain whether either direct or indirect physical contact has occurred.<sup>196</sup> The court of appeals then traced the evolution of Indiana case law interpreting uninsured motorist provisions as they pertain to hit-and-run drivers and indirect physical contact.<sup>197</sup> The court of appeals continued by explaining that although a majority of jurisdictions are in agreement that no coverage is provided in "miss-and-run" situations,<sup>198</sup> the jurisdictions differ significantly in their application of uninsured motorist coverage to fact situations in which the insured is injured by impelled objects, by still-moving vehicle parts or loads, or by collision with stationary parts or loads that are left upon the road.<sup>199</sup> After reviewing this case law, the court concluded that Will is entitled to coverage "upon providing evidence sufficient to establish that there was a continuous sequence of events that clearly began with a load of debris falling from an unidentified vehicle and ended in Will's contact with the pile of debris."<sup>200</sup>

In *State Farm Fire and Casualty v. Garrett*,<sup>201</sup> the Indiana Court of Appeals examined whether one named insured could reject uninsured motorist coverage on behalf of all named insureds in a personal liability umbrella policy ("umbrella policy"). In January 1986, James Garrett ("Garrett") applied for an umbrella policy from State Farm.<sup>202</sup> When filling out the application, Garrett listed his wife's name on the application.<sup>203</sup> Only Garrett signed the application, including the section entitled, "REJECTION OF UNINSURED MOTORISTS COVERAGE."<sup>204</sup> When Garrett received the umbrella policy, he was the only named insured listed on the declarations page.<sup>205</sup> The definitions section of the policy, however, provided that "named insured" means the person named in the declarations and the spouse.<sup>206</sup> The policy was annually renewed, with the last renewal effective January 17, 1999.<sup>207</sup> On January 18, 1999, Garrett's wife, Barbara, was involved in an automobile accident which resulted in her death.<sup>208</sup>

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196. *Id.* (citing *Rice v. Meridian Ins. Co.*, 751 N.E.2d 685, 688 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d 422 (Ind. 2001)).

197. *Id.*

198. "Miss-and-run" situations are those situations where an accident occurs not because of a direct impact between two or more vehicle but because one vehicle indirectly causes another vehicle to collide with a third vehicle or object. *See, e.g., Rice*, 751 N.E.2d at 686 n.1.

199. *Will*, 776 N.E.2d at 1236.

200. *Id.* at 1237.

201. 783 N.E.2d 329 (Ind. Ct. App.), *trans. denied*, 804 N.E.2d 748 (Ind. 2003).

202. *Id.* at 331.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*



Subsequently, Garrett submitted a claim for uninsured motorist benefits to State Farm.<sup>209</sup> State Farm then filed a declaratory judgment action seeking a determination that uninsured motorist coverage was not available under the umbrella policy because Garrett had expressly rejected such coverage when he applied for the policy.<sup>210</sup> Barbara's Estate ("Estate") counterclaimed, seeking a determination that State Farm was required to provide uninsured motorist benefits under the umbrella policy.<sup>211</sup> Following cross-motions for summary judgment, the trial court denied State Farm's motion and granted the Estate's motion, finding "uninsured motorist coverage as mandatory under the provisions of Indiana Code [section] 27-7-5-2 was not rejected as to the named insured, [Barbara]."<sup>212</sup> At the time that Garrett applied for the umbrella policy, Indiana Code section 27-7-5-2, in pertinent part, simply provided that "the named insured of an automobile or motor vehicle liability policy has the right, in writing" to reject uninsured and underinsured motorist coverage.<sup>213</sup>

The court of appeals framed the issue as whether the Estate is entitled to recover uninsured motorist benefits under the Garretts' umbrella policy when James Garrett, but not his wife Barbara Garrett, expressly rejected uninsured motorist coverage in writing when he applied for the policy.<sup>214</sup> State Farm argued that because any recovery for Barbara's death will inure to the direct benefit of Garrett, and not the Estate, Garrett should not be able to claim the uninsured motorist benefits that he rejected in his application for coverage.<sup>215</sup> Additionally, State Farm contended that Garrett was acting as Barbara's agent when he signed the application for insurance; therefore, his rejection of coverage served to reject coverage for Barbara as well.<sup>216</sup> Last, State Farm claimed that a legislative amendment to the statute indicates that Garrett's signature declining coverage was sufficient to reject uninsured coverage on behalf of himself and Barbara under Indiana Code section 27-7-5-2.<sup>217</sup>

At the outset, the court of appeals reiterated that Indiana Code section 27-7-5-2 is "a mandatory coverage, full-recovery, remedial statute,"<sup>218</sup> that the insured is entitled to uninsured motorist benefits unless expressly waived in the manner provided by law,<sup>219</sup> and that "[p]ersons defined as 'insureds' under the liability section of an insurance policy are those for whom the legislature intended uninsured motorist benefits."<sup>220</sup> Further, the court of appeals recognized that

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209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 333 (quoting IND. CODE § 27-7-5-2 (1982)).

214. *Id.*

215. *Id.* at 334.

216. *Id.* at 335.

217. *Id.* at 337.

218. *Id.* at 333 (citing *United Nat'l Ins. Co. v. DePrizio*, 705 N.E.2d 455, 460 (Ind. 1999)).

219. *Id.* (citing *United Nat'l Ins. Co.*, 705 N.E.2d at 460).

220. *Id.* (quoting *Connell v. Am. Underwriters, Inc.*, 453 N.E.2d 1028, 1030 (Ind. Ct. App.

Barbara was a named insured under the State Farm umbrella policy and was, therefore, entitled to uninsured motorist coverage unless she expressly rejected it in the manner provided for by law.<sup>221</sup> Thus, the court of appeals had to decide whether Garrett's written rejection of uninsured motorist coverage was sufficient to reject such coverage on behalf of Barbara.<sup>222</sup>

As to State Farm's first argument, the court of appeals posited that the determinative factor in deciding whether uninsured motorist coverage applied to Barbara was whether Barbara, a named insured by the policy's own terms, rejected such coverage.<sup>223</sup> The court of appeals continued by stating that whether Garrett rejected such coverage for himself, yet stood to benefit if Barbara was deemed to have such coverage, was irrelevant.<sup>224</sup>

Moving on to State Farm's next argument, the court of appeals initially noted that marriage in itself does not create an agency relationship.<sup>225</sup> Further, the court of appeals found that contrary to State Farm's contention, the umbrella policy did not establish an agency relationship between Garrett and Barbara.<sup>226</sup> In reaching this conclusion, the court of appeals distinguished the instant case from *Employers Insurance v. Stopher*,<sup>227</sup> based on the language of the policy in the *Stopher* case, which provided, "[t]he Named Insured shown in the Declarations is authorized to act for each additional Named Insured listed in all matters pertaining to this insurance including, but not limited to . . . ."<sup>228</sup> There was no similar provision in the Garretts' umbrella policy. Consequently, the court of appeals found *Stopher* unpersuasive and readily distinguishable.<sup>229</sup>

The court of appeals then disposed of State Farm's final argument by resorting to the fundamental rule of statutory construction that an amendment changing a prior statute indicates a legislative intention that the meaning of the prior statute has changed.<sup>230</sup> Moreover, the court of appeals noted that such an amendment raises a presumption that the legislature intended to change the law unless it clearly appears that the legislature passed the amendment to express the original intention of the law more clearly.<sup>231</sup> Because there was no clear indication that the legislature passed the amendment to express the original

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1983)).

221. *Id.*

222. *Id.*

223. *Id.* at 334.

224. *Id.*

225. *Id.* at 335 (citing *Bradford v. Bentonville Farm Supply, Inc.*, 510 N.E.2d 745, 747 (Ind. Ct. App. 1987)).

226. *Id.* at 336.

227. 155 F.3d 892 (7th Cir. 1998) (applying Indiana law), *reh'g denied*.

228. *State Farm Fire & Cas. Co.*, 783 N.E.2d at 336 (quoting *Employers Ins.*, 155 F.3d at 896).

229. *Id.*

230. *Id.* at 337 (citing *Bennett v. Ind. Life & Health Ins. Guar. Ass'n*, 688 N.E.2d 171, 179 (Ind. Ct. App. 1997), *trans. denied*, 698 N.E.2d 1191 (Ind. 1998)).

231. *Id.*



intention more clearly, the court of appeals resolved that the 1999 amendment to Indiana Code section 27-7-5-2, providing that any named insured could reject coverage on behalf of all insureds, represented a change in the law.<sup>232</sup> Thus, the court of appeals affirmed the trial court's denial of State Farm's motion for summary judgment and grant of summary judgment in favor of the Estate.<sup>233</sup>

The Indiana Court of Appeals revisited Indiana Code section 27-7-5-2 in *State Farm Mutual Automobile Insurance Co. v. Steury*.<sup>234</sup> In March 1986, Esther Steury signed an application for State Farm automobile insurance in which she specifically requested uninsured motorist coverage but rejected underinsured motorist coverage.<sup>235</sup> Subsequently, Esther signed a "Rejection of Uninsured and Underinsured Motor Vehicle Coverage."<sup>236</sup>

In 1995, the Indiana legislature amended Indiana's uninsured and underinsured motorist coverage statute by adding a requirement that insurers "make underinsured motorist coverage available to all existing policyholders on the date of the first renewal of existing policies that occurs on or after January 1, 1995, and on any policies newly issued or delivered on or after January 1, 1995."<sup>237</sup> Esther received a document entitled "Important Information About Underinsured Motor Vehicle Coverage" with the first premium-due notice after January 1, 1995.<sup>238</sup> After receiving this document, Esther did not contact State Farm or otherwise notify State Farm of her intent to purchase the underinsured motorist coverage.<sup>239</sup>

Esther and her niece were both killed in 2000 as a result of a collision between Esther's State Farm insured automobile and an underinsured motorist. State Farm filed a declaratory relief action, which prompted the representatives of Esther and her niece (collectively, "Representatives") to file a motion for summary judgment because Esther "did not reject the coverage in writing on or after the occasion of the first renewal of her policy that occurred on or after January 1, 1995."<sup>240</sup> State Farm also filed for summary judgment, arguing that it made underinsured motorist coverage available to Esther by sending her the document entitled "Important Information About Underinsured Motor Vehicle Coverage."<sup>241</sup> The trial court granted the Representatives' motion for summary judgment and denied State Farm's, holding that Esther's 1988 written rejection of the uninsured and underinsured motorist coverage did not operate to reject the coverage after January 1, 1995, and that State Farm did not make coverage

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232. *Id.* at 337-38.

233. *Id.* at 338.

234. 787 N.E.2d 465 (Ind. Ct. App.), *trans. dismissed*, 2003 Ind. LEXIS 509, at \*1 (Ind. 2003).

235. *Id.* at 467.

236. *Id.*

237. *Id.* (quoting IND. CODE § 27-7-5-2 (2003)).

238. *Id.*

239. *Id.* at 468.

240. *Id.*

241. *Id.*

available to Esther after January 1, 1995, nor did it obtain a written rejection of the coverages after January 1, 1995.<sup>242</sup>

The court of appeals defined the issue as whether the Representatives were entitled to underinsured motorist benefits because State Farm did not make underinsured motorist coverage available to the insured by offering the coverage to Esther after January 1, 1995, and did not obtain a written rejection of coverage.<sup>243</sup> State Farm argued that the trial court erred in its determination that State Farm did not make underinsured motorist coverage available to Esther, pointing to the document entitled "Important Information About Underinsured Motor Vehicle Coverage" as evidence that it did in fact make such coverage available.<sup>244</sup> The Representatives countered that the document was insufficient to make coverage available and that State Farm was required to, but did not, obtain Esther's rejection of coverage in writing.<sup>245</sup>

Relying on its previous holding in *State Auto Insurance Cos. v. Shannon*,<sup>246</sup> the court of appeals opined that the amendment to Indiana Code section 27-7-5-2 did not carve out an exception from offering underinsured motorist coverage to those who had previously waived underinsured motorist coverage.<sup>247</sup> The court of appeals, however, recognized that this case turned not on the sufficiency of the offer, as it did in *Shannon*, but rather on the sufficiency of the response.<sup>248</sup> After examining the language of Indiana Code section 27-7-5-2, the court of appeals concluded that the statute clearly and unambiguously requires a written rejection of both newly issued policies and post-January 1, 1995 renewal policies.<sup>249</sup> Because Esther did not reject underinsured motorist coverage in writing, the court of appeals found that she was entitled to such coverage as a matter of law and affirmed the trial court's grant of summary judgment in favor of the Representatives.<sup>250</sup>

## VII. RELEASE

In *American Family Insurance Group v. Houin*,<sup>251</sup> the Indiana Court of

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242. *Id.*

243. *Id.*

244. *Id.* at 469.

245. *Id.*

246. 769 N.E.2d 228, 233-34 (Ind. Ct. App. 2002).

247. *Steury*, 787 N.E.2d at 471.

248. *Id.* at 472.

249. *Id.*

250. *Id.* Judge Sullivan concurred in part and dissented in part. *Id.* at 473 (Sullivan, J., concurring and dissenting). While Judge Sullivan would affirm the trial court, he disagreed with the majority leaving unresolved the question of whether the document entitled "Important Information About Underinsured Motor Vehicle Coverage" constituted an offer under Indiana Code § 27-7-5-2. *Id.* (Sullivan, J., dissenting). Judge Sullivan opined that the document "clearly and unmistakably constitutes an offer . . ." *Id.* (Sullivan, J., dissenting).

251. 777 N.E.2d 757 (Ind. Ct. App. 2002).



Appeals addressed whether an insurer's release of a tortfeasor and his automobile liability insurer, together with all other persons, corporations, associations, and partnerships, barred an insured's claim for underinsured motorist benefits. In September 1994, a vehicle driven by Mark Milliser collided with a vehicle driven by John Houin.<sup>252</sup> The Houins, who were insured by American Family at the time of the collision, sued Milliser.<sup>253</sup>

Counsel for the Houins sent American Family correspondence in December 1994, placing it on notice that the Houins intended to file a claim for underinsured motorist benefits if Milliser did not have sufficient insurance coverage.<sup>254</sup> The Houins' attorney followed up on this first letter by sending a second one in November 1999 which disclosed that the Houins would be making a claim for underinsured motorist benefits and indicated that Milliser's insurer had offered to tender Milliser's policy limits to Houin.<sup>255</sup> Additionally, the letter referenced Indiana Code section 27-7-5-6, which provides that once an insurer is informed of a bona fide offer to settle it has thirty days to either advance the settlement amount to the insured or give the insured permission to accept the offer.<sup>256</sup> Indiana Code section 27-7-5-6 further provides that if the insurer does not respond within thirty days, it is deemed to have given the insured permission to accept the offer in exchange for a full and complete release of the wrongdoer.<sup>257</sup> After sending two more letters with no response, the Houins executed a release with Milliser and his insurer.<sup>258</sup> The lengthy release referenced and linked the parties to the release at three different points.<sup>259</sup> Nearly twelve months later, the Houins filed a complaint against their insurer, American Family, for underinsured motorist coverage.<sup>260</sup> In response, American Family filed a motion for summary judgment, claiming that the language of the release signed by the Houins unequivocally released all potential claims against any entity or person.<sup>261</sup> The trial court denied American Family's motion.<sup>262</sup>

In an interlocutory appeal, American Family urged the court of appeals to reverse the trial court's denial of its motion for summary judgment because the release signed by the Houins unequivocally and unqualifiedly released all possible claims with regard to the collision with Milliser.<sup>263</sup> Noting its

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252. *Id.* at 758.

253. *Id.*

254. *Id.* at 759.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 761; *cf.* *Estate of Spry v. Greg & Ken, Inc.*, 749 N.E.2d 1269, 1272 (Ind. Ct. App. 2001) (finding that all possible defendants were released by a general release that did not contain language limiting release to the parties).

260. *Houin*, 777 N.E.2d at 760.

261. *Id.*

262. *Id.*

263. *Id.*

disagreement, the court of appeals reiterated some of the standards for contract interpretation.<sup>264</sup> The court of appeals then indicated that the parties to the release clearly employed qualifying language to express their intent that the release only pertain to the parties who were signatories to the document and any person or corporation connected to them.<sup>265</sup> Consequently, the court of appeals affirmed the trial court's denial of American Family's motion for summary judgment.<sup>266</sup>

In another case involving a release, *Depew v. Burkle*,<sup>267</sup> the Indiana Court of Appeals addressed whether a release of the tortfeasor in an automobile accident operates to also release a physician who treated the plaintiff's injuries and was sued for malpractice based upon that treatment. Tonda Depew was involved in an automobile accident with David Stigler.<sup>268</sup> As a result of the collision, Depew sustained multiple injuries, including a fractured right arm.<sup>269</sup> Dr. Robert Burkle performed multiple surgeries on Depew's arm.<sup>270</sup> After her right arm "snapped" at or near the site where Dr. Burkle had previously performed surgery, Depew underwent additional surgery which revealed that Dr. Burkle had nearly severed Depew's radial nerve.<sup>271</sup> Additionally, Depew was informed that the surgery performed by Dr. Burkle may not have been medically necessary.<sup>272</sup> Subsequently, Depew filed a negligence complaint against Stigler based on the damages she sustained as a result of the collision.<sup>273</sup> Stigler's insurer settled the case for \$102,500.00.<sup>274</sup> In exchange for this amount, Depew executed a release, which stated:

Plaintiff hereby absolutely and unconditionally releases and forever discharges David Stigler, and all other companies and persons, their respective successors and assigns, and whether known or unknown, from any and all claims, demands, actions, costs, damages and causes of action which the Plaintiff now has, ever had, or may have in the future on account of any and all damages, losses or injuries sustained by the Plaintiff by reason of an incident which occurred on October 10, 1995, it is understood and agreed by and among all of the parties to the within

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264. *Id.* at 761.

265. *Id.*

266. *Id.* at 762. Chief Judge Brook concurred in the result, noting that in his eyes the release was ambiguous but that based on the facts he would affirm based on certain portions of the release and parol evidence, which indicated that the parties to the release did not intend to release American Family. *Id.*

267. 786 N.E.2d 1144 (Ind. Ct. App.), *trans. denied*, 804 N.E.2d 757 (Ind. 2003).

268. *Id.* at 1145.

269. *Id.*

270. *Id.* at 1146.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*



release that payment of said sum to the Plaintiff, and its acceptance by the Plaintiff, is in full accord and satisfaction of a disputed claim and that the payment of said sum shall not in any way be construed as an admission of liability in said matter by any party hereto, and that liability is expressly denied by the party making said payment or on whose behalf said payment is made.<sup>275</sup>

Prior to settling her claim against Stigler with his insurer, Depew filed a proposed complaint against Dr. Burkle with the Indiana Department of Insurance alleging medical malpractice.<sup>276</sup> Following a decision by a medical review panel, Depew filed a complaint for damages against Dr. Burkle.<sup>277</sup> By this time, Depew had already settled her claim against Stigler and signed the release.<sup>278</sup> Consequently, in his answer Dr. Burkle asserted the affirmative defense of either full or partial satisfaction.<sup>279</sup> Thereafter, Dr. Burkle filed a motion for summary judgment, designating in support of the motion the settlement with Stigler and the ensuing release Depew signed in connection with that action.<sup>280</sup> The trial court granted summary judgment in Dr. Burkle's favor, and Depew appealed.<sup>281</sup>

The general rule regarding releases was first articulated by our supreme court in *Huffman v. Monroe County Community School Corp.* as follows:

A release executed in exchange for proper consideration works to release only those parties to the agreement unless it is clear from the document that others are to be released as well. A release, as with any contract, should be interpreted according to the standard rules of contract law. Therefore, from this point forward, release documents shall be interpreted in the same manner as any other contract document, with the intention of the parties regarding the purpose of the document governing.<sup>282</sup>

Adhering to *Huffman*, the court of appeals examined the language of the release to determine whether Depew intended it to release not only Stigler but Dr. Burkle as well.<sup>283</sup> The court of appeals identified two controlling factors when

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275. *Id.* at 1149.

276. *Id.* at 1146.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 1146-47.

281. *Id.* at 1147.

282. 588 N.E.2d 1264, 1267 (Ind. 1992).

283. *Depew*, 786 N.E.2d at 1147. While generally distinguishing joint tortfeasors—which are tortfeasors whose actions unite and combine to form a single injury—from successive tortfeasors—which are tortfeasors whose respective negligent acts are independent of one another and produce different injuries—the court of appeals resolved that it need not decide whether Dr. Burkle should be considered a joint tortfeasor or successive tortfeasor because the same analysis applied regardless of how it chose to classify Dr. Burkle. *Id.*

determining the effect of a release. First, the trier of fact must examine whether the injured party received full satisfaction.<sup>284</sup> Second, the trier of fact examines whether the parties intended that the release be in full satisfaction of the injured party's claim, thus releasing all successive tortfeasors from liability.<sup>285</sup> The court of appeals noted, however, that a release executed in exchange for proper consideration works to release only those parties to the agreement unless it is clear from the document that others are to be released as well.<sup>286</sup> Because these are factual determinations that are not proper subjects for summary disposition, the court of appeals concluded that summary judgment was inappropriate.<sup>287</sup> The court of appeals explained that on remand, the jury could consider parol evidence in determining whether Depew intended to release Burkle when she signed the release of Stigler.<sup>288</sup>

After determining that the release of Stigler did not—as a matter of law—operate as a release of Dr. Burkle, the court of appeals then addressed whether Dr. Burkle is entitled to any type of set-off with respect to the amount paid to Depew by Stigler.<sup>289</sup> Recognizing that a plaintiff should not be able to recover twice for the same injury, the court of appeals explained that where acts committed by multiple defendants cause a single injury to a plaintiff, a defendant against whom judgment is rendered at trial may set-off the amount of any funds plaintiff received from any settling joint tortfeasor.<sup>290</sup> Because the facts in the record were not sufficiently developed to establish whether Dr. Burkle's medical malpractice was contemplated in the Stigler action, the court of appeals remanded the case for the fact-finder to make the determination of whether Dr. Burkle is entitled to a set-off.<sup>291</sup>

## VIII. DAMAGES

### A. Punitive Damages

In *Cheatham v. Pohle*,<sup>292</sup> the Indiana Supreme Court upheld the constitutionality of the punitive damages statute. In reaching its holding, the court considered whether the allotment of seventy-five percent of punitive damage awards to the State of Indiana's victim compensation fund pursuant to section 34-51-3-6 of the Indiana Code is an unconstitutional taking of the prevailing party's property pursuant to the U.S. and Indiana Constitutions. The court also addressed whether the same statute violates article 1, section 21 of the

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284. *Id.* at 1148 (citing *Wecker v. Kilmer*, 294 N.E.2d 132 (Ind. 1973)).

285. *Id.*

286. *Id.* (citing *Stemm v. Estate of Dunlap*, 717 N.E.2d 971 (Ind. Ct. App. 1999)).

287. *Id.* at 1150.

288. *Id.* at 1149 (citing *Cooper v. Cooper*, 730 N.E.2d 212, 216 (Ind. Ct. App. 2000)).

289. *Id.* at 1150.

290. *Id.*

291. *Id.* at 1152.

292. 789 N.E.2d 467 (Ind. 2003).



Indiana Constitution because it is an unconstitutional demand on the prevailing party's attorney without just compensation.

Doris Cheatham sued her former husband, Michael Pohle, for invasion of privacy and intentional infliction of emotional distress after he posted nude photographs of her in various public places. A jury awarded Cheatham \$100,000 in compensatory damages and \$100,000 in punitive damages.<sup>293</sup>

The statute that permits the State to take seventy-five percent of Cheatham's punitive damage award, reads, in relevant part, as follows:

(a) [W]hen a judgment that includes a punitive damage award is entered in a civil action, the party against whom the judgment was entered shall pay the punitive damage award to the clerk of the court where the action is pending.

(b) Upon receiving the payment described in subsection (a), the clerk of the court shall:

- (1) pay the person to whom punitive damages were awarded twenty-five percent (25%) of the punitive damage award; and
- (2) pay the remaining seventy-five percent (75%) of the punitive damage award to the treasurer of state, who shall deposit the funds into the violent crime victims compensation fund.<sup>294</sup>

Cheatham asserted that the statute violates both the Takings Clauses found in the Indiana Constitution and the U.S. Constitution. She also argued that the statute demands an attorney's "particular services" without just compensation.<sup>295</sup>

At the outset, the court first observed that the "purpose of punitive damages is not to make the plaintiff whole or to attempt to value the injuries of the plaintiff. Rather, punitive damages, sometimes designated 'private fines' or 'exemplary damages,' have historically been viewed as designed to deter and punish wrongful activity."<sup>296</sup> The court also noted that "Indiana . . . has chosen an intermediate ground permitting juries to award punitive damages and thereby inflict punishment on the defendant, but placing restrictions on the amount the plaintiff may benefit from the award."<sup>297</sup> Because punitive damages are not intended to compensate a plaintiff, the court asserted that a plaintiff has no entitlement to an award of punitive damages in any amount.<sup>298</sup>

The court also reasoned that a plaintiff has no right to punitive damages because they are a common law creation subject to change by the legislature.<sup>299</sup> Rejecting Cheatham's argument that her right to collect punitive damages is

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293. *Id.* at 470.

294. IND. CODE § 34-51-3-6 (2002).

295. *Cheatham*, 789 N.E.2d at 470.

296. *Id.* at 471.

297. *Id.* at 472.

298. *Id.*

299. *Id.* at 473.

"connected to" her claim for actual, compensatory damages, the court stated that the "Indiana legislature has chosen to define the plaintiff's interest in a punitive damages award as only twenty-five percent of any award, and the remainder is to go to the Violent Crimes Victims' Compensation Fund. The award to the Fund is not the property of the plaintiff."<sup>300</sup>

The court next addressed Cheatham's argument that the State's right to collect seventy-five percent of her punitive damage award, without a corresponding obligation to pay any attorney's fees, unconstitutionally demands the services of her attorney without just compensation.<sup>301</sup> The court agreed that an attorney's services are "particular" as that term appears in the Indiana Constitution.<sup>302</sup>

The court found that, although legal representation of a plaintiff is a particular service, it is not a service that is demanded by the State. Specifically, the court observed that "[i]n order for there to be a state demand on a person's particular services, there must be the threatened use of physical force or legal process that leads that person to believe that they have no choice but to submit to the will of the State."<sup>303</sup> Finding that an attorney may not be compelled to represent a plaintiff to pursue punitive damages without recovering a fee, the court held that "[s]ection 34-51-3-6 does not exact a taking of private property or place a demand on any attorney to undertake any representation."<sup>304</sup>

### *B. Excessive Damages*

In *Stroud v. Lints*,<sup>305</sup> the Indiana Supreme Court accepted transfer to review a damage award in a personal injury bench trial. An intoxicated Michael Stroud, aged seventeen, drove through a stop sign at an excessive speed and collided with another vehicle.<sup>306</sup> Stroud's passenger was severely and permanently injured and all occupants of the other vehicle died.<sup>307</sup> The surviving passenger and his parents filed suit against Stroud.<sup>308</sup>

After a bench trial, the trial court found against the defendants and awarded the plaintiffs approximately \$1.4 million in compensatory and \$500,000 in

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300. *Id.*

301. *Id.* at 476.

302. *Id.* The court looked to the test set forth in *Bayh v. Sonnenburg*, 573 N.E.2d 398 (Ind. 1991), "to determine whether there has been a state demand of particular services." *Cheatham*, 789 N.E.2d at 475. In this case, the test is whether Cheatham's attorney (1) performed particular services, "(2) on the State's demand, (3) without just compensation." *Id.* (citing *Bayh*, 573 N.E.2d at 411).

303. *Cheatham*, 789 N.E.2d at 476 (citing *Bayh*, 573 N.E.2d at 417).

304. *Id.* at 477.

305. 790 N.E.2d 440 (Ind. 2003).

306. *Id.* at 441.

307. *Id.*

308. *Id.* at 442.



punitive damages.<sup>309</sup> On appeal, the defendant contended that the \$500,000 punitive damage award “was excessive because, given his financial situation and prospects, there was no possibility he could ever pay it.”<sup>310</sup> Finding that the trial court had not abused its discretion, the court of appeals affirmed the punitive damage award.<sup>311</sup>

On transfer, the supreme court first stated that the amount of damages awarded by a trial court is subject to appellate review de novo.<sup>312</sup> The supreme court found that the court of appeals had erroneously reviewed the trial court’s punitive damage award under an abuse of discretion standard.<sup>313</sup> The supreme court’s unanimous opinion devotes significant attention to the court’s analysis as to why de novo was the appropriate standard of review.<sup>314</sup>

The court next determined that the award was inappropriate given the defendant’s finances.<sup>315</sup> In considering the legal rationale for punitive damage awards, the court noted that such awards are not to compensate the victim or the victim’s attorney. Instead,

[c]urrent law recognizes that punitive damages may serve the societal objective of deterring similar conduct by the defendant or others by way of example. For that reason, if punitive damages are appropriate, the wealth of the defendant has for many years been held relevant to a determination of the appropriate amount.<sup>316</sup>

Because this case involved a motor vehicle collision, the court reasoned that the defendant, and others the court may seek to deter, were frequently without significant resources.<sup>317</sup> As such, the defendant’s wealth warranted due consideration in this circumstance.<sup>318</sup> The court concluded that Stroud’s inability to discharge the punitive damage award in bankruptcy, coupled with his age and incarceration, made it highly improbable that he would ever be able to satisfy the punitive damage judgment.<sup>319</sup> The court further opined that the award would “permanently cripple” the defendant and potentially lead him to a life of crime.<sup>320</sup>

Moreover, the court noted that in cases where punishment and deterrence are the stated purposes for a punitive damage award, “the economic wealth of the

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309. *Id.* at 441.

310. *Id.* at 442.

311. *Id.* at 441.

312. *Id.*

313. *Id.* at 442.

314. *Id.* at 442-46. The court’s analysis discusses the recent United States Supreme Court opinion of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 503 U.S. 408 (2003).

315. *Id.* at 445.

316. *Id.* (citing *Hibschman Pontiac, Inc. v. Batchelor*, 362 N.E.2d 845, 849 (Ind. 1977)).

317. *Id.* at 446.

318. *Id.*

319. *Id.*

320. *Id.*

defendant is material to the issue of punitive damages so that these objectives will be fulfilled."<sup>321</sup>

Applying the de novo standard of review the court held that, given the defendant's financial circumstances, the trial court's \$500,000 punitive damages award was clearly excessive.<sup>322</sup> The court vacated the judgment and remanded the case to the trial court for entry of a new award.<sup>323</sup>

### C. Inadequate Damages

In *Matovich v. Rogers*,<sup>324</sup> the Indiana Court of Appeals found that a jury's damage award of \$586.16 was not inadequate as a matter of law despite the fact that (1) the trial court held that the defendant was negligent as a matter of law; and (2) the plaintiff presented evidence that she incurred \$8110.10 in medical expenses related to the automobile collision at issue.<sup>325</sup>

After final arguments were made as to damages, the jury was instructed that it could only award damages for injuries caused by the defendant and that the plaintiff had the burden of proving that her claimed condition was due to the defendant's negligence. The jury was further instructed that it could not allow any damages which were "remote, imaginary, uncertain, or conjectural or speculative in their nature, even though testified to by witnesses."<sup>326</sup> After the jury awarded the plaintiff \$586.16 in damages, the plaintiff unsuccessfully moved for a new trial.<sup>327</sup>

On appeal, the court noted that when an appellant claims a jury award is inadequate, the court must "consider only the evidence that supports the award together with the reasonable inferences therefrom. . . . If there is any evidence to support the amount of the award, even if it is conflicting, this court will not reverse."<sup>328</sup>

The plaintiff primarily argued that the defendant had presented no evidence to refute her medical bills. The court agreed that there was no controversy that the plaintiff incurred the medical expenses; however, the court noted it was the plaintiff's "burden to prove by a preponderance of the evidence the expenses that were incurred as a proximate result of the collision."<sup>329</sup>

After her initial medical treatment, the plaintiff was not referred to any other physicians for additional treatment. Instead, the plaintiff testified that she sought

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321. *Id.* at 447 (quoting *Ramada Hotel Operating Co. v. Shaffer*, 576 N.E.2d 1264, 1267-68 (Ind. Ct. App. 1991)).

322. *Id.* at 441.

323. *Id.*

324. 784 N.E.2d 954 (Ind. Ct. App. 2003).

325. *Id.* at 956-57.

326. *Id.* at 957.

327. *Id.*

328. *Id.* (quoting *Ritter v. Stanton*, 745 N.E.2d 828, 843 (Ind. Ct. App. 2001)).

329. *Id.* at 958 (emphasis in original).



additional treatment at the suggestion of family and friends.<sup>330</sup> The physician from whom the plaintiff next received treatment, Dr. Jordan, was unable to determine whether some of the plaintiff's injuries had existed before the collision. Dr. Jordan did not refer the plaintiff to any other healthcare providers for treatment.<sup>331</sup> Nonetheless, the plaintiff began treatment with Dr. Frechette for problems other than her neck pain. In the course of her treatment with Dr. Frechette, the plaintiff asked Dr. Frechette to order an MRI at the request of her attorney.<sup>332</sup> The court noted that the MRI showed a minimal herniation of the plaintiff's disc, but showed no resulting pressure on the nerves in her spinal column. Further, "pressure on the spinal nerve root will produce radiating pain symptoms on the same side of the body as the pressure on the nerve, but the herniation to [plaintiff's] disk was on the right side and her complained of pain was on the left side of her neck."<sup>333</sup> Finally, the court observed that the herniation was first observed more than three years after the accident.<sup>334</sup>

Finding that Dr. Jordan's records and testimony supported the inference that the injuries to the plaintiff that were proximately caused by the collision had resolved within two months of the incident, the court deduced that the jury

could have concluded that only [the plaintiff's] initial medical expenditures—from PromptCare, the prescriptions, and early examination and treatments by Dr. Jordan—were damages "directly attributable" to the collision. . . . The jury's damages award covers these damages. Because the evidence supports the damages awarded, we cannot find them inadequate as a matter of law.<sup>335</sup>

#### *D. Emotional Damages*

In *Keim v. Potter*,<sup>336</sup> the Indiana Court of Appeals held that the trial court erred when it found that Keim's emotional damages claim was barred by the modified impact rule. After donating blood, Keim was informed that his blood tested positive for hepatitis C and was advised to contact a physician. After some testing, Keim's physician, Dr. Potter, advised Keim that his test results were not definitive and suggested that Keim return for a second recombinant immuno-blot assay ("RIBA") test. Keim complied and returned to Dr. Potter for a second RIBA test; however, Dr. Potter ordered another antibody screen instead of the RIBA test.<sup>337</sup> The test results showed that Keim's antibody screen was positive for hepatitis C. In January 1994, Dr. Potter telephoned Keim and advised him

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330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* at 958-59 (internal citations omitted).

336. 783 N.E.2d 731 (Ind. Ct. App. 2003).

337. *Id.* at 732.

that he definitely had hepatitis C. Dr. Potter also advised Keim that his symptoms may include fatigue, pain, and jaundice and that Keim "could develop serious liver damage, including cirrhosis and cancer."<sup>338</sup> Keim was also advised that his "hepatitis C would kill him in fifteen to twenty years' time."<sup>339</sup>

At the time he was told he had hepatitis C, Keim was thirty-three years old, married and the father of two children. Keim made several changes to his lifestyle, including taking extreme measures to protect his wife and kids from becoming infected. He also changed the way he ate, drank, and exercised. The dramatic changes took a toll on Keim's behavior and negatively impacted his familial relationships. Eventually, Keim and his wife divorced.<sup>340</sup>

Keim followed Dr. Potter's advice to have his liver function tested every six months. Over a two and one half year period, no impairment of Keim's liver function was detected. On May 13, 1996, Dr. Potter realized the mistake he made with regard to Keim's second RIBA test and admitted as much to Keim. Subsequent testing showed that Keim never had hepatitis C.<sup>341</sup>

After filing a claim against Dr. Potter before the Department of Insurance and obtaining an opinion from a medical review panel, Keim filed his complaint with the trial court. Thereafter, Dr. Potter filed a motion for partial summary judgment alleging that Keim's emotional damages claim was barred by the modified impact rule. The trial court entered partial summary judgment in Dr. Potter's favor, and Keim brought an interlocutory appeal.<sup>342</sup>

On appeal, the court reviewed Indiana's current modified impact rule as it has been defined in the last several years by *Shuamber v. Henderson*, *Conder v. Wood* and *Groves v. Taylor*.<sup>343</sup> Most recently, in *Groves*, the supreme court held that direct involvement in an incident was sufficient to satisfy the modified impact rule.<sup>344</sup>

Applying the standard espoused in *Groves*, the court determined that Dr. Potter mistakenly diagnosed Keim with a "life-altering and deadly disease . . . [a]s such, he was 'directly involved' in the result of Dr. Potter's alleged negligence . . . . Keim's claimed emotional injuries are serious in nature and of a kind and extent normally expected to occur in a reasonable person faced with the same circumstances."<sup>345</sup>

Dr. Potter argued that the *Groves* holding was controlling only with regard to recovery by bystanders. As such, Dr. Potter argued that Keim did not sustain an "impact" sufficient to meet the requirements of the Indiana's modified impact

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338. *Id.*

339. *Id.*

340. *Id.* at 732-33.

341. *Id.* at 733.

342. *Id.*

343. *Id.* at 734 (citing *Groves v. Taylor*, 729 N.E.2d 569 (Ind. 2000); *Conder v. Wood*, 716 N.E.2d 432 (Ind. 1999); *Shuamber v. Henderson*, 579 N.E.2d 452 (Ind. 1991)).

344. *Groves*, 729 N.E.2d at 573.

345. *Keim*, 783 N.E.2d at 735 (citing *Groves*, 729 N.E.2d at 573; *Shuamber*, 579 N.E.2d at 456).



rule.<sup>346</sup> In rejecting Dr. Potter's argument, the court stated that it did "not see the logic in allowing a witness to claim emotional damages while precluding an actual victim of negligence from claiming such damages, where both plaintiffs have suffered a direct involvement reasonably expected to result in emotional injury."<sup>347</sup> The court concluded its opinion noting that "where, as here, a patient claims emotional damages as a result of alleged medical malpractice, he is sufficiently 'directly involved' to satisfy the modified impact rule."<sup>348</sup> After finding that Keim was entitled to present his emotional damages claim to the trier of fact, the court reversed the trial court's order and remanded the case for further proceedings.

#### IX. GOVERNMENTAL ENTITIES AND THE INDIANA TORT CLAIMS ACT

The Indiana Supreme Court also touched on different aspects of the Indiana Tort Claims Act ("ITCA")<sup>349</sup> during the survey period. In the first of the three ITCA cases discussed herein,<sup>350</sup> *Catt v. Board of Commissioners*,<sup>351</sup> the supreme court examined whether a county was entitled to immunity under the ITCA for a condition caused by the weather.<sup>352</sup> As Brian Catt was driving through Knox County, Indiana, the morning after heavy rains had fallen on the area, he crashed his car into a water-filled ditch in the middle of the road. Apparently, the heavy rains had washed out a culvert, which in turn, left a ditch in the middle of the road. Unable to stop his automobile in time due to slick mud on the roadway, Catt crashed into the ditch left by the washed-out culvert.<sup>353</sup> As a result, Catt sustained serious injuries.<sup>354</sup>

Subsequently, Catt filed an action against Knox County ("the County"), alleging negligent inspection and maintenance of the roadway.<sup>355</sup> The County claimed statutory immunity, among other defenses, and filed a motion for

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346. *Id.*

347. *Id.*

348. *Id.*

349. The legislature enacted the ITCA in 1974 in response to appellate court decisions that abolished sovereign immunity for the State and its political subdivisions. *Gonser v. Bd. of Comm'rs*, 378 N.E.2d 425, 427 (Ind. 1978). The enactment of the ITCA was aimed at establishing a uniform body of law to govern the prosecution of tort claims, and only tort claims, against the State and other governmental entities, including counties. *Id.* In particular, the ITCA sets forth special notice requirements that must be adhered to when seeking to file a claim against a governmental entity, *see* IND. CODE §§ 34-13-3-6 and -8 (2003); delineates certain situations where a governmental entity enjoys immunity, *see id.* § 34-13-3-3; and limits a governmental entity's aggregate liability, *see id.* § 34-13-3-4.

350. As an aside, we note that all three unanimous opinions were authored by Justice Rucker.

351. 779 N.E.2d 1 (Ind. 2002).

352. *Id.* at 2.

353. *Id.*

354. *Id.*

355. *Id.*

summary judgment in which it alleged that it owed no duty to Catt, it was immune from liability under the ITCA, and that Catt's action was completely barred by his contributory negligence.<sup>356</sup> The trial court granted summary judgment to the County but issued no findings or conclusions in support of its decision.<sup>357</sup> Catt appealed the trial court's grant of summary judgment.<sup>358</sup> The Indiana Court of Appeals reversed, finding that the County was not entitled to immunity under the ITCA because the washed-out culvert was not a "temporary" condition. There were disputed issues of material fact regarding whether Catt was contributorily negligent, and genuine issues of material fact existed as to whether the County breached its duty of care to maintain public thoroughfares in a safe condition for travel.<sup>359</sup> The County sought transfer solely on whether the County was immune from liability under the ITCA.<sup>360</sup>

On transfer, the supreme court affirmed the trial court's holding that the ITCA granted immunity to the County.<sup>361</sup> Relying on Indiana Code section 34-13-3-3(3), which provides in pertinent part that "[a] governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from . . . [t]he temporary condition of a public thoroughfare . . . which results from weather," the court analyzed whether the loss suffered by the plaintiff was the result of the weather and whether the condition of the road was "temporary."<sup>362</sup> Initially, the court reiterated that a governmental entity has a common law duty to exercise reasonable care and diligence to keep its streets and sidewalks in a reasonably safe condition for travel.<sup>363</sup> The court also acknowledged, however, that the ITCA provides immunity for temporary conditions caused by the weather.<sup>364</sup> The court continued by explaining that the relevant inquiry in determining whether a governmental entity is immune under the ITCA is whether the loss suffered was actually the result of weather or some other factor.<sup>365</sup> Additionally, the court explained that the focus of whether the condition is permanent is whether the governmental entity has had the time and opportunity to remove the obstruction but failed to do so.<sup>366</sup>

Based on the materials in the record, the supreme court determined that the culvert washed out as a result of the rainstorm, which had occurred just a few hours before the accident, and the condition of the thoroughfare was unknown

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356. *Id.* at 2-3.

357. *Id.* at 3.

358. *Id.*

359. *Id.*; see also *Catt v. Bd. of Comm'rs*, 736 N.E.2d 341 (Ind. Ct. App. 2000), *vacated*.

360. *Catt*, 789 N.E.2d at 3.

361. *Id.*

362. *Id.*

363. *Id.* (citing *Galbreath v. City of Indianapolis*, 255 N.E.2d 225, 227 (1970)).

364. *Id.* at 4 (citing *Van Bree v. Harrison County*, 584 N.E.2d 1114, 1117 (Ind. Ct. App. 1992)).

365. *Id.* (citing *Bd. of Comm'rs v. Angulo*, 655 N.E.2d 512, 513 (Ind. Ct. App. 1995)).

366. *Id.* at 5 (citing *Van Bree*, 584 N.E.2d at 1117).



to the County until after the accident.<sup>367</sup> Thus, the court declared that the ditch in the middle of the roadway was indeed a “temporary” condition that resulted from the weather, of which the County had no notice.<sup>368</sup> Because the condition of the roadway was temporary and resulted from the weather, the court concluded that the County was immune under the ITCA.<sup>369</sup>

The Indiana Supreme Court also addressed the ITCA in *Bushong v. Williamson*.<sup>370</sup> Specifically, in *Bushong*, the supreme court addressed whether a trial court may examine evidence outside of a complaint to determine whether a public employee was acting within the scope of employment at the time he committed an alleged tort.<sup>371</sup> After being kicked once by a student and admonishing the student to cease such behavior, David Williamson, a teacher with the South Montgomery School Corporation, caught fifth-grade student Jonathan Bushong’s ankle as he attempted to kick the teacher again and then struck Bushong on the back, legs, and buttocks with his hand. Bushong sustained bruises from the encounter.<sup>372</sup> Bushong’s parents (“the Bushongs”) subsequently filed a tort claims notice with the school corporation and the Indiana Political Subdivision Risk Management Commission.<sup>373</sup> The Bushongs did not pursue a claim against the school, but they did file an action against Williamson individually.<sup>374</sup> Following discovery, Williamson moved for summary judgment.<sup>375</sup> The trial court granted Williamson’s motion based upon its review of the pleadings and discovery responses, which revealed that Williamson’s actions were done within the scope of his employment and that the Bushongs failed to give Williamson notice as required by the ITCA.<sup>376</sup> The Bushongs appealed and the court of appeals reversed after finding that the ITCA precluded the trial court from considering documents outside of the complaint in determining whether the defendant’s acts occurred within the scope of employment, that a genuine issue of material fact existed whether Williamson’s act occurred in the scope of employment, and that the trial court erred in determining that the Bushongs were required to give Williamson notice under the ITCA.<sup>377</sup> Williamson sought transfer, which the supreme court granted.<sup>378</sup>

On transfer, the supreme court rejected the court of appeals’ view that the

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367. *Id.* at 6.

368. *Id.*

369. *Id.*

370. 790 N.E.2d 467 (Ind. 2003).

371. *Id.* at 469.

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*; see also *Bushong v. Williamson*, 760 N.E.2d 1090, 1095, 1097, 1098 (Ind. Ct. App. 2001), *vacated*.

378. *Bushong*, 790 N.E.2d at 470; see also *Bushong v. Williamson*, 774 N.E.2d 514 (Ind. 2002).

ITCA—specifically Indiana Code section 34-13-3-5(a)—precludes a court from examining materials other than the complaint when deciding whether an employee acted within the scope of his employment.<sup>379</sup> In particular, the court held that the 1995 Amendment to the ITCA, which bars lawsuits against government employees personally, does not preclude the trial court from examining evidence outside of the complaint to determine whether the employee was acting within the scope of employment.<sup>380</sup>

Indiana Code section 34-13-3-5(a) in pertinent part provides, “[a] lawsuit alleging that an employee acted within the scope of the employee’s employment must be *exclusive to the complaint* and bars an action by the claimant against the employee personally.”<sup>381</sup> While the court of appeals interpreted the italicized language to mean that the trial court is confined to looking only to the face of the complaint in determining whether the defendant’s acts occurred in the scope of employment, the supreme court opined that the italicized language was merely intended to require a plaintiff to explicitly state in his complaint whether the plaintiff was alleging that the plaintiff was acting within the scope of his employment when the tort occurred.<sup>382</sup> In other words, Indiana Code section 34-13-3-5(a) does not preclude a court from considering materials outside of the complaint when making a scope of employment determination. The supreme court indicated that requiring the plaintiff to designate in his complaint that a tortious act occurred within the scope of employment provides an immediate and early indication that the employee is not personally liable.<sup>383</sup> Further, the supreme court continued by stating that the statute is silent as to what happens when no scope of employment allegation is set forth in the complaint and explained that in such a situation, if the post-complaint discovery supports that the employee acted within the scope of his employment, then it is appropriate to grant summary judgment.<sup>384</sup>

The supreme court also addressed whether an employee’s actions fall outside the scope of his employment simply because his actions can be characterized as criminal.<sup>385</sup> The court posited that even criminal acts may be considered within the scope of employment if “the criminal acts originated in activities so closely associated with the employment relationship as to fall within its scope.”<sup>386</sup> Because the discovery materials conclusively established that Williamson was acting within the scope of his employment, the supreme court found that the trial

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379. *Bushong*, 790 N.E.2d at 471.

380. *Id.* at 474.

381. *Id.* at 471.

382. *Id.* at 471-72.

383. *Id.* at 472.

384. *Id.* But see *id.* at 472 n.4 (indicating that an Indiana Trial Rule 12(b)(6) motion to dismiss is the appropriate course of action where the complaint alleges that a government employee acted within the scope of employment).

385. *Id.* at 472-73.

386. *Id.* at 473 (quoting *Stropes v. Heritage House Children’s Ctr., Inc.*, 547 N.E.2d 244, 247 (Ind. 1989)).



court was correct to make that determination as a matter of law and grant summary judgment in favor of Williamson.<sup>387</sup>

The Indiana Supreme Court also applied the ITCA in *King v. Northeast Security, Inc.*<sup>388</sup> Following some incidents of mischief at North Central High School, the Metropolitan School District of Washington Township ("Washington Township") contracted with Northeast Security, Inc. ("Northeast") to provide uniformed deputies to be positioned outside of the school from 7:00 a.m. to 3:30 p.m. each school day. After classes were dismissed at 3:00 p.m. on April 18, 1996, a fight broke out in the North Central parking lot. During the altercation, Nicholas King sustained serious injuries. The Northeast employee who was supposed to be stationed in the parking lot was inside the school building making a personal phone call as the fight occurred.<sup>389</sup> Additionally, the school official who usually kept watch over the parking lot after classes were dismissed was absent that day and did not assign anyone to replace him that afternoon in the parking lot.<sup>390</sup> King sued both Northeast and Washington Township.<sup>391</sup>

In response, both defendants filed motions for summary judgment, claiming that they did not owe King a duty to protect him from the criminal acts of third parties.<sup>392</sup> The trial court ruled that Northeast owed no duty to King because King was not a third party beneficiary of the security services agreement between Northeast and Washington Township.<sup>393</sup> Additionally, the trial court granted summary judgment in favor of Washington Township, noting that, as a governmental entity, Washington Township did not owe a private duty to King to protect him from the alleged harm.<sup>394</sup> King appealed and the Indiana Court of Appeals affirmed summary judgment in favor of Northeast but reversed the summary judgment in favor of Washington Township, holding that Washington Township could be liable to King for breach of its duty to supervise the safety of its students.<sup>395</sup> Both King and Washington Township sought transfer, which was granted.<sup>396</sup>

On transfer, the supreme court first addressed whether Washington Township was entitled to immunity, examining common law immunity and the ITCA.<sup>397</sup> As to common law, the court explained that sovereign immunity persists in only three areas following Indiana's enactment of the ITCA: (1) where a city or state fails to provide adequate police protection to prevent crime; (2) where a state

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387. *Id.*

388. 790 N.E.2d 474 (Ind.), *reh'g denied*, 2003 Ind. LEXIS 570, at \*1 (Ind. 2003).

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.* at 478.

395. *Id.*; *see also* *King v. Northeast Sec., Inc.*, 732 N.E.2d 824 (Ind. Ct. App.), *vacated*, 2000 Ind. App. LEXIS 1994, at \*1 (Ind. Ct. App. 2000).

396. *King v. Northeast Sec., Inc.*, 753 N.E.2d 10 (Ind. 2001).

397. *King*, 790 N.E.2d at 478.

official makes an appointment of an individual whose incompetent performance gives rise to a suit alleging negligence on the part of the state official for making such an appointment; and (3) where judicial decision-making is challenged.<sup>398</sup> Finding that none of these three categories were implicated by the facts of this case, the court ruled that Washington Township was not entitled to common law immunity.<sup>399</sup> The court then turned to the ITCA.

Under the ITCA, the supreme court separately examined immunity for acts of non-governmental employees and immunity for law enforcement.<sup>400</sup> After identifying Washington Township as a governmental entity within the meaning of the ITCA that is entitled to immunity, the court turned to Indiana Code section 34-13-3-3(9).<sup>401</sup> The court explained that immunity under Indiana Code § 34-13-3-3(9) applies in "actions seeking to impose vicarious liability by reason of conduct of third parties" other than governmental employees acting within the scope of their employment.<sup>402</sup> While recognizing that Indiana Code section 34-13-3-3(9) immunizes Washington Township from liability for non-governmental employees' actions, the court opined that summary judgment was not appropriate because there was a factual dispute as to whether King's injuries were the result of an act or omission by Northeast or by Washington Township itself.<sup>403</sup>

The supreme court next examined Indiana Code section 34-13-3-3(7),<sup>404</sup> which grants law enforcement immunity. After essentially rejecting the public/private duty test,<sup>405</sup> the court posited that Indiana Code section 34-13-3-3(7) does not provide immunity to Washington Township.<sup>406</sup> In making this determination, the court explained that Indiana Code section 34-13-3-3(7) immunity is restricted to the adoption and enforcement of laws that are within the assignment of the governmental unit.<sup>407</sup> Because the court did "not think a school district is 'enforcing' a law when it provides for school security, even if the action taken may deter or prevent acts that would violate a law 'adopted' and 'enforced' by other units of government,"<sup>408</sup> it ruled that Indiana Code section 34-13-3-3(7) did not confer immunity upon Washington Township.<sup>409</sup> Finally as to King's negligence claim against Washington Township, the court explained that

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398. *Id.* (citing *Campbell v. State*, 284 N.E.2d 733, 736-37 (Ind. 1972)).

399. *Id.* at 478-80.

400. *Id.* at 480.

401. The current version of Indiana Code section 34-13-3-3(9) is now codified at Indiana Code section 34-13-3-3(10). *Id.* at 480 n.2.

402. *Id.* at 481 (quoting *Hinshaw v. Bd. of Comm'rs*, 611 N.E.2d 637, 640-41 (Ind. 1993)).

403. *Id.*

404. The current version of Indiana Code section 34-13-3-3(7) is now codified at Indiana Code section 34-13-3-3(8). *Id.* at 480 n.2.

405. For a more in-depth discussion of the public/private duty test, see *Quakenbush v. Lackey*, 622 N.E.2d 1284 (Ind. 1993).

406. *King*, 790 N.E.2d at 483.

407. *Id.* at 482.

408. *Id.* at 483.

409. *Id.* at 484.



summary judgment is not appropriate on King's claim due to a discrepancy in the evidence bearing on the extent of control retained by Washington Township and how any such control was exercised.<sup>410</sup>

Shifting its focus to Northeast, the court examined whether King must be a third party beneficiary to the Washington Township/Northeast Contract in order to assert a claim.<sup>411</sup> Answering this inquiry in the negative, the court highlighted that the purpose of the agreement between Washington Township and Northeast was to provide security services for the school, thereby protecting all members of the public, including students, who were rightfully on the premises.<sup>412</sup> The court noted that "[i]f the trier of fact concludes that Northeast's failure to 'observe' King's assault was due to its negligence and was a proximate cause of King's injuries," then recovery is appropriate.<sup>413</sup> In light of the foregoing, the supreme court reversed the trial court's grant of summary judgment in favor of Washington Township and in favor of Northeast.<sup>414</sup>

### CONCLUSION

While there were several new developments in the area of tort law during the survey period, the foregoing represent those cases that the authors consider to be the most significant.

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410. *Id.* at 485.

411. *Id.*

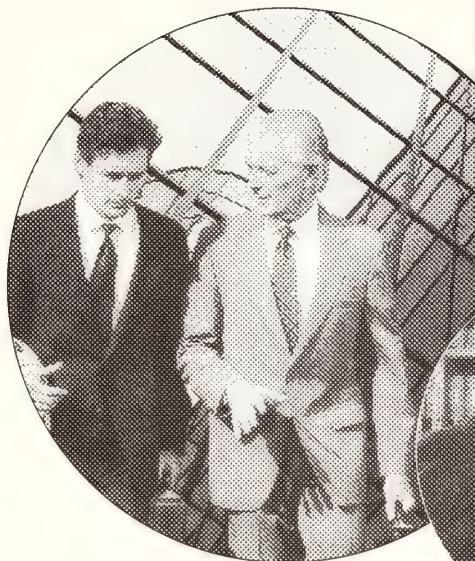
412. *Id.*

413. *Id.* at 487.

414. *Id.*







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